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## COPYRIGHT ARBITRATION ROYALTY PANEL

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In the matter of:

Digital Performance Right in  
Sound Recording and Ephemeral  
Recording

Docket No.  
2000-9

CARP DTRA  
1 & 2

Conference Room 216  
Second Floor  
Offices of Arnold & Porter  
555 12th Street, N.W.  
Washington, D.C.

Monday,  
October 22, 2001

The above-entitled matter came on for rebuttal  
hearing, pursuant to notice, at 9:00 a.m.

BEFORE

THE HONORABLE ERIC E. VAN LOON	Chairman
THE HONORABLE JEFFREY S. GULIN	Arbitrator
THE HONORABLE CURTIS E. von KANN	Arbitrator

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ORIGINAL

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## C-O-N-T-E-N-T-S

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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**James McDermott**

By Mr. Newberg

12890

12904

By Mr. Steinthal

12765

12896

By Mr. Kirby

12856

12901

**Wolfgang Spegg**

By the Panel on page 12906

**Scott Purcell**

By the Panel on page 13032

**John Heilbronn**

By the Panel on page 13096

<u>EXHIBIT</u>	<u>DESCRIPTION</u>	<u>MARK</u>	<u>RECD</u>
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P-R-O-C-E-E-D-I-N-G-S

(9:06 a.m.)

CHAIRMAN VAN LOON: Well, good morning everyone. Great to see you. Hope you had a chance to enjoy yesterday off, and I know at least part of the room is extremely pleased at the way things worked out late last night.

So the Panel is extremely relieved and delighted to have it confirmed, once again, that the fire power on that side of the table exceeds the fire power on this side of the table, and that you all thought ahead to advise our licensee witnesses for this afternoon that they should not go to the Library of Congress but should, instead, come here. And we are deeply grateful for you having thought of that and figured out a way to reach them.

We don't know -- haven't been able to reach Gina -- whether she had thought of the same thing. But, thankfully, that was done. And I suppose we -- has anyone, as far as we know, reached Mr. Hackett for tomorrow or Junkayla (phonetic) or Junkala?

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1 MR. GARRETT: We will.

2 CHAIRMAN VAN LOON: You're able to do  
3 that. Wonderful. Thank you very much.

4 Are there any other administrative or  
5 procedural things for us?

6 MR. STEINTHAL: I would say this on sort  
7 of a good news/bad news front. I noticed actually  
8 this morning on the schedule of the witnesses that all  
9 of the licensees were scheduled for this afternoon.  
10 The good news is this is going to be very short. The  
11 bad news is, had I noticed that sooner, I could have  
12 saved Mr. McDermott coming down last night, and we  
13 could have done this at 12:30 or something, you know,  
14 before the licensees come in.

15 But as you know -- and I have gotten  
16 better at my estimates. My estimate on Mr. McDermott  
17 was probably a half an hour tops, half an hour to 45  
18 minutes tops. And I'm more confident of that than I  
19 was even before. So we're going to end up with a  
20 rather long hiatus this morning.

21 So the good news is it will be brief. The  
22 bad news is that the way that witnesses lay out, had

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1 I noticed that previously, we might have been able to  
2 move things around a little bit.

3 CHAIRMAN VAN LOON: Well, I think that we  
4 are all feeling a bit more relieved about the  
5 schedule. What had looked like near mission  
6 impossible or a death march looks like something that  
7 we're going to -- knock on wood -- be able to handle  
8 within the days available.

9 Mr. McDermott, good morning.

10 MR. McDERMOTT: Morning.

11 CHAIRMAN VAN LOON: Welcome.

12 MR. McDERMOTT: Thank you.

13 CHAIRMAN VAN LOON: We are very  
14 appreciative of your coming down, and hopefully you  
15 had an enjoyable time coming last night, so it's not  
16 an incredible hardship to not show up later this  
17 morning.

18 MR. McDERMOTT: Had some great Italian.

19 CHAIRMAN VAN LOON: Excellent. Excellent.

20 MR. McDERMOTT: I'm proud to be part of  
21 the process. Thank you.

22 CHAIRMAN VAN LOON: Well, we're pleased to

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1 have you. Let me ask you, please, to raise your right  
2 hand to be sworn in by our Court Reporter.

3 WHEREUPON,

4 JAMES McDERMOTT

5 was called as a witness and, having been first duly  
6 sworn, assumed the witness stand, was examined and  
7 testified as follows:

8 ARBITRATOR VON KANN: Can I ask just one  
9 question on scheduling? In view of what Mr. Steinthal  
10 has just said, would it make any sense, and is it  
11 possible, to start the afternoon session, say, at 1:00  
12 instead of 1:30? Is there any way to reach Mr. Spegg  
13 and move us up slightly? I don't know whether that's  
14 feasible or not. If it isn't, you know, no big deal,  
15 but --

16 MR. STEINTHAL: That's fine with me. If  
17 -- I don't have any communication with him, so --

18 MR. GARRETT: We had contact with him. I  
19 don't know whether we can reach him this morning or  
20 not, but we can certainly try and see what happens.

21 ARBITRATOR VON KANN: Okay.

22 ARBITRATOR GULIN: I would say more like

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1 11:00.

2 CHAIRMAN VAN LOON: Well, I don't know if  
3 we should get him that early.

4 ARBITRATOR GULIN: Can you get in touch  
5 with him? He's in town? He's ready to come?  
6 Especially as soon as possible. We're going to be  
7 finished with this witness very shortly.

8 CHAIRMAN VAN LOON: We'll certainly be  
9 here, and if it's possible, if we figure out a way --  
10 I'm trying to remember, though. Isn't he from the  
11 West Coast?

12 ARBITRATOR VON KANN: He's here. He's in  
13 town.

14 CHAIRMAN VAN LOON: I know. But if you  
15 don't know where he is, and you've got to call his  
16 office to find out, and it's 6:00 a.m. in his  
17 office --

18 MR. STEINTHAL: Spegg is from Toronto,  
19 so --

20 CHAIRMAN VAN LOON: He's Toronto, that's  
21 right. Well --

22 ARBITRATOR VON KANN: Actually, Vermont,

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1 isn't he now? Some days or --

2 MR. STEINTHAL: We'll find out later,  
3 won't we?

4 CHAIRMAN VAN LOON: Okay. Mr. McDermott,  
5 we all appreciate the effort that you put into putting  
6 together your written statement, which we've had a  
7 chance to review. And it's so clear that I don't  
8 think we even need to have your counsel ask much by  
9 the way of direct. But do you have --

10 MR. STEINTHAL: In the exercise of  
11 reminding the Panel of who we're dealing with here, I  
12 was going to ask Mr. McDermott if he wanted to spend  
13 a couple of minutes describing his background, what  
14 his current position is, and then get into the cross  
15 examination questions. But I think it would be  
16 helpful for context reasons for Mr. McDermott to give  
17 that bit of background, and then we can go right into  
18 the cross.

19 CHAIRMAN VAN LOON: Good. Okay.

20 THE WITNESS: I've been in the record  
21 business in various positions since 1984, started out  
22 working as a clerk in a record store on Long Island

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1 and kind of worked up through the retail world until  
2 I started working for Warner/Elektra/Atlantic  
3 Distributors in 1987, doing local marketing.

4 Did that for about a year and a half and  
5 then went to Polygram to do alternative marketing in  
6 the New York market for -- for about a year, and then  
7 I went to Island Records in 1990 and was the National  
8 Director of Alternative Marketing for Island, mostly  
9 working on emerging artists, artists that didn't have  
10 a real good chance to get played on radio or had a  
11 real good chance in retail.

12 That's kind of been a theme throughout my  
13 career, I guess, is getting new things started under  
14 difficult circumstances.

15 Kept with the marketing, mostly on the  
16 retail side, until about 1994 when I started to get  
17 involved with the RIAA Multimedia Executive Committee  
18 with Polygram, which was working primarily at that  
19 time on the introduction of the enhanced CD format,  
20 which back then was called CD Plus for about five  
21 minutes, which was a -- which was supposed to be a new  
22 product that included -- it was a CD with multimedia

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1 functionality that we thought was going to be the --  
2 the next great thing. And it ended up being the next  
3 okay thing.

4 And then, in 1995, Polygram, because of --  
5 as a result of my experience working with that, put me  
6 in charge of new media in the United States, and I  
7 became VP of New Media in 1995, in March I think it  
8 was. And was with Polygram until they were acquired  
9 by Universal in -- I guess I left there in July 1999,  
10 and then I went to Sony. I've been working with Sony  
11 since July 1999.

12 Throughout my tenure at Polygram I worked  
13 on online internet marketing, development of policies,  
14 and business strategy, both in the United States and,  
15 actually, it evolved into a global role because the  
16 U.S. was the leader in the new media field.

17 ARBITRATOR VON KANN: You used the term a  
18 couple of times "alternative marketing," which, as far  
19 as I can recall, has not been used in this arbitration  
20 before. If it has, I forget. What is -- in the  
21 context of the record industry, what is "alternative  
22 marketing"?

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1 THE WITNESS: Finding different channels  
2 to get music to people, to expose it to them and to  
3 enable them to buy it.

4 ARBITRATOR VON KANN: And what kind of  
5 channels might those be?

6 THE WITNESS: Well, in the old world, it  
7 was something as simple as maybe doing a non-  
8 conventional television campaign, working with --  
9 maybe setting up campaigns with National Public Radio,  
10 putting an artist on the back of a truck or in a van  
11 and getting them to show up and play in parking lots,  
12 so that if they weren't being played on the radio  
13 people had a way of hearing their music.

14 ARBITRATOR VON KANN: Is this something  
15 that most record companies do in one way or another?

16 THE WITNESS: Yes, sir. And, actually,  
17 the web has provided new ways of doing that.

18 ARBITRATOR VON KANN: Okay.

19 CROSS EXAMINATION

20 BY MR. STEINTHAL:

21 Q When you say "the web has provided new  
22 ways of doing that," what do you mean?

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1           A       New methods of exposing different types of  
2 music to people. It's a new medium, new channel, so  
3 new ways of doing things.

4           Q       And you mentioned that a theme throughout  
5 your career has been emerging artists. Can you  
6 explain a little bit more what you mean by that?

7           A       Artists that typically are traditional  
8 windows to the public, are very selective. They are  
9 very effective filters of taste for consumers. And  
10 part of our job is promoting to those filters, so that  
11 then ultimately music can get through them to  
12 consumers via those different windows.

13          Q       Could you give a little bit more of an  
14 example what you mean by "those windows to the  
15 public"?

16          A       As it relates to just generally promoting  
17 an artist?

18          Q       Yes.

19          A       Working a record to radio, calling up a  
20 retailer and making sure that they have the record in  
21 stock and that potentially they're playing it in the  
22 store, or that they've got the record in the front of

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1 the store, or they've put a poster up, giving out  
2 fliers at college campuses, everything from -- you  
3 know, there's different types of marketing, obviously,  
4 for different levels of artists.

5 But when you're first starting an artist  
6 and they've got very little exposure, you've got to  
7 think of all sorts of creative ways to get --  
8 ultimately to get them to that stage where every time  
9 you turn on the radio there's millions of people  
10 listening to it.

11 Q In the context of your being involved in  
12 emerging artists, I take it you've become aware, over  
13 the course of the last 10 years in particular, about  
14 how much more limited broadcast radio play lists have  
15 become. Is that right?

16 A Yes.

17 Q Has it been sort of a steady refrain from  
18 the major labels in the last decade or so that it's  
19 become harder to launch new artists on broadcast radio  
20 because so many of the -- the play lists have become  
21 more contracted?

22 A There has been a lot of consolidation in

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1 -- not only in radio but also in the retail space.  
2 And as a result, because we, at the same time, over  
3 the past decade have put out -- started putting out a  
4 lot more records. There is less places for our music  
5 to get out, certainly.

6 Q And what have you done to overcome the  
7 constricted sort of broadcast promotional opportunity  
8 in terms of the width of the play list to try to  
9 promote new artists?

10 A A multitude of things. It would be  
11 difficult to answer the question and tie it up with a  
12 neat little bow, because it depends on the music. If  
13 it's an artist who is a bluegrass artist, we might  
14 send them to county fairs with cassette samplers to  
15 give out to people in the audience and have them play  
16 almost for -- for no money and develop a buzz from a  
17 very grass-roots kind of a level.

18 I think promotion is all about timing.  
19 It's about understanding that at a certain point in an  
20 artist's career it will be time to take them to those  
21 windows with your case as to why those -- those  
22 windows should pay attention to that artist and

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1 further expose them.

2 Q And when you were talking earlier in  
3 response to Judge von Kann's question about what fell  
4 within the alternative media area, the alternative  
5 media being principally the areas to which you would  
6 seek resort to promote before people --

7 A Right.

8 Q -- broadcast radio, correct?

9 A If you're talking about mainstream, large-  
10 scale, commercial radio in major markets, yes. There  
11 are plenty of radio stations, like college radio  
12 stations, that we spend -- spend a tremendous amount  
13 of time trying to get those stations which have  
14 different criteria for playing music to pay attention  
15 to artists as well.

16 It's all about taking the right artist at  
17 the right time to the right outlets. There's a  
18 tremendous amount of thought that's put into it, as I  
19 refer to in my testimony.

20 Q Is it a correct statement that, you know,  
21 15, 20 years ago it was more common that in smaller  
22 markets, before the consolidation of the broadcast

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1 radio business, in smaller markets there might be  
2 radio stations that the labels would use as sort of  
3 test beds for new artists, and then try to spring them  
4 in more major market radio stations later?

5 A That is something that didn't only happen  
6 15 years ago. I think that's happened throughout the  
7 history of the record business. It continues. It's  
8 not limited to just radio promotion. If a track has,  
9 let's say, a Latin kind of a feel, we'll look at  
10 markets that we know traditionally do really well in  
11 that kind of music and try to get visibility for a  
12 record and see if we can start a spark at the clubs,  
13 radio stations, retailers, and on the street.

14 As a matter of fact, we have street teams,  
15 particularly in some urban areas, that market records  
16 to barber shops. They'll actually go into -- because  
17 those end up being kind of social hubs, where people  
18 sit around and talk about music and things. So we'll  
19 get -- we have people that go out and put posters up  
20 in barber shops and hand out cassette singles and CD  
21 singles to try to get a buzz started there.

22 Q It's fair to say --

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1 CHAIRMAN VAN LOON: You said a little bit  
2 earlier that there was a narrowing, both on radio and  
3 in retail space. It sort of ties in, in my mind, with  
4 barber shops. Are there fewer record stores now than  
5 there used to be, or is it -- because it seems to me  
6 that there are more and bigger. But is it perhaps  
7 that they just use up more of the bins for shelf space  
8 on major artists, or what did you mean by the  
9 narrowing of the retail space?

10 THE WITNESS: There used to be a lot more  
11 diversity in the types of retail stores. One of the  
12 things that -- one of the kinds of stores I've worked  
13 with throughout my entire career is the mom and pop  
14 store where you go into a record store and the people  
15 behind the counter recognize you and know what your  
16 individual tastes are from visiting that store over a  
17 period of time.

18 And so they'll say, "I've got this great  
19 new record in from, you know, an import from the U.K.  
20 yesterday, and I think you'll really enjoy it." That  
21 process, because of the way that the retail space has  
22 changed, isn't as prevalent as it used to be.

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1           You know, as you mentioned, there are big  
2 stores that have a tremendous amount of stuff, and  
3 people go in with all of this content sitting in this  
4 big place and don't know what to go.

5           CHAIRMAN VAN LOON: I see. Thank you.

6           ARBITRATOR GULIN: Would you guess that  
7 there's some correlation between the narrowing of the  
8 play lists on the radio and the narrowing of the  
9 inventory at retail stores?

10          THE WITNESS: I wouldn't -- I wouldn't  
11 necessarily say as a blanket comment that there's a  
12 narrowing of inventory at record stores, because there  
13 are quite a few stores that are these gigantic kind of  
14 superstores that have everything.

15           I think that the process of -- it becomes  
16 a much more difficult task to individually tailor for  
17 the person that comes in to understand what they might  
18 like and what might appeal to them when you've got  
19 this tremendous store with 36,000 skews in it.

20           To have somebody walk in, it's just -- I  
21 don't know how often you gentlemen go to record  
22 stores, but when you do go into those stores it's

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1       difficult just to even find where the Beatles is. You  
2       know, is it alphabetical? Is it in rock? Is it in --  
3       you know, where is it?

4               So I think it's just the nature of the  
5       fact that they -- the age of the superstore is upon  
6       us.

7               CHAIRMAN VAN LOON: I've learned that you  
8       have to ask somebody and --

9               ARBITRATOR VON KANN: Half the time they  
10      don't know.

11              (Laughter.)

12              CHAIRMAN VAN LOON: And they're used to  
13      paying attention to a different age clientele.

14              ARBITRATOR VON KANN: Right.

15              THE WITNESS: I used to be that person in  
16      that store, and I really tried to make sure that I  
17      knew who my customer was. But it's a rare thing these  
18      days, unfortunately.

19              BY MR. STEINTHAL:

20              Q       Mr. McDermott, going back to where we were  
21      about the grass-roots type marketing to break new  
22      bands, and stuff like that, let me contrast that for

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1 a minute to a couple of the statements in your  
2 prepared testimony where you talk about repetition on  
3 broadcast radio as being really the key to broadcast  
4 radio promotional benefit to the labels. You remember  
5 testifying to that about --

6 A Could you refer to a specific page, so I  
7 can just understand what you're specifically referring  
8 to.

9 Q Well, let me ask you this. It is a  
10 correct statement, is it not, that you believe that  
11 the biggest value to broadcast radio promotion is the  
12 repetition that occurs when songs are played over and  
13 over again on broadcast radio to a large market, and  
14 that's what drives the promotional benefit for the  
15 label?

16 MR. NEWBERG: Can you maybe break that up  
17 into --

18 MR. STEINTHAL: Okay.

19 MR. NEWBERG: -- one question at a time?

20 CHAIRMAN VAN LOON: There is a paragraph  
21 that's on page 3 that deals with that.

22 MR. STEINTHAL: Yes. The full paragraph

1 on page 3 before Section 2.

2 BY MR. STEINTHAL:

3 Q You're talking here about for a sound  
4 recording to become popular it requires repetition,  
5 and you focus on the values of repetition in broadcast  
6 radio, is that right?

7 A Yes.

8 Q Now, I take it from what you've testified  
9 to earlier today there's a bit of a chicken and egg  
10 thing going on here. You've got to break the new band  
11 before it can get that air play, which gets the  
12 repetition, right?

13 A If you're talking about a major commercial  
14 radio station in the major market, that's an accurate  
15 statement. It is not -- it is a less accurate  
16 statement if you're talking about college radio, let's  
17 say, in a local market, because certainly records  
18 break regionally at those different levels that I  
19 referred to before.

20 Q But in terms of the most significant area  
21 of promotional value of air play on radio to you in  
22 your current position at Sony Music, you would say

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1 it's the big market stations and the repetition they  
2 drive, right?

3 A The repetition is obviously of huge value  
4 to us. But I think that to characterize that as,  
5 let's say, the only thing that's valuable to us --  
6 when a radio station gets behind a record, there's a  
7 tremendous amount of stuff that they do for it. There  
8 are local events with the artists. They have the  
9 artists come on air. They will sponsor concerts.  
10 They run contests with their listeners.

11 So the repetition is part of a -- really,  
12 when a station decides to play a record that much,  
13 they really decide to get behind an artist. So, yes,  
14 the repetition is of huge value. But the repetition  
15 has to have this kind of thread of a marketing message  
16 that's conveyed to the consumer in that market. And  
17 when you add those two things together, that's when we  
18 start to see sales.

19 Q So you agree with the notion that the  
20 principal effect on sales is from the big market, but  
21 you would also agree, I take it, that it's important  
22 to engage in promotional activities that will help

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1 break new bands, whether at college radio or other  
2 kinds of alternative media as specified before, right?

3 MR. NEWBERG: Again, I'm going to just  
4 object. That's two questions. If you want to ask  
5 him, first, if he agrees with one statement, and then  
6 with the other.

7 MR. STEINTHAL: I think it was understood  
8 by the witness.

9 ARBITRATOR VON KANN: The objection is  
10 compound question?

11 MR. NEWBERG: Yes. He assumed that he  
12 agreed with one statement, and then said, "Since you  
13 agree with that, do you agree with this?" I'd prefer  
14 if he asked whether or not he agrees with the first  
15 statement to begin with.

16 MR. STEINTHAL: I'm happy to break it up.  
17 I think it was understood, but I'll break it up.

18 CHAIRMAN VAN LOON: Thank you.

19 BY MR. STEINTHAL:

20 Q I take it from your last answer that you  
21 believe that the principal effect of promotion are  
22 felt by large market stations and the repetition they

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1 generate of sound recordings, correct?

2 A When you want to start selling millions of  
3 records, that's the level you want to be at.

4 Q But at the same time, you would agree with  
5 the premise that it's important to have promotional  
6 activities in the alternative media that you specified  
7 previously, in part to generate the opportunity to  
8 reach broadcast radio media, correct?

9 A Correct. It's a symbiotic relationship.

10 Q Now, you're familiar with the fact, are  
11 you not, that there are some artists whose careers  
12 have actually taken off after significant internet  
13 exposure before having gotten major broadcast radio  
14 exposure, correct?

15 A I would tend to disagree with that  
16 characterization. In my experience, having done  
17 internet marketing for -- since 1994, 1995, there  
18 hasn't been one shining example that the internet  
19 community has been able to show and say, "This  
20 happened because of the internet."

21 Internet has always been a factor, and  
22 it's what I do for a living. So if I were to say it's

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1 of no value, I'd be, you know, on a bread line  
2 somewhere. But I would not say that there's really  
3 any artist that we can point to and say, "The internet  
4 broke this band by the traditional yardstick that the  
5 record industry would use." Started yes, broke no.

6 Q Okay. Let me, then, distinguish between  
7 those two words in your mind. Would it be fair to say  
8 that the internet has created -- helped create, as you  
9 say, a start in the sense that it's created a buzz  
10 about someone that has helped launch a successful  
11 recording career?

12 A Back to your chicken and egg comment,  
13 usually what happens is we sign an act, and then use  
14 the internet to help make people aware of that act.  
15 It isn't necessarily the case, in my experience, that  
16 the internet makes us aware of something which then we  
17 take to the next level.

18 Q That's a fair distinction. So that the  
19 internet, then, is one of those alternative media that  
20 you're exploiting to try to create awareness of new  
21 artists where broadcast radio has made it harder to  
22 launch new artists because they're constricted play

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1 lists, right?

2 A Yes. But I wouldn't want to characterize  
3 -- I wouldn't want to limit the characterization of  
4 the promotional value of the internet to just new  
5 artists. It's -- we also do things with major artists  
6 online as well.

7 ARBITRATOR VON KANN: Can you explain the  
8 two terms you've distinguished -- start an artist and  
9 break an artist?

10 THE WITNESS: Start an artist is you get  
11 handed a tape, and maybe an artist has -- they got  
12 signed out of Philadelphia, and they've been playing  
13 clubs, and nobody has really ever heard of them. And  
14 you have to figure by listening to that record who  
15 might be the appropriate age demographic for that,  
16 what markets you might want to try to start that  
17 artist in, what type of music it is, so that then you  
18 can figure out what kind of print magazine campaign do  
19 I want to come up with, do I want to do a video for  
20 this artist. It's really starting from -- from almost  
21 nothing.

22 When you break an artist is when you've

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1 built kind of this groundswell up to the point where  
2 a lot of people are paying attention and you kind of  
3 cross -- you're crossing that bridge between not a lot  
4 of people know, not a lot of people care, to there's  
5 enough of a spark there where the people who pay  
6 attention to things that really sell start to notice.  
7 And that's when you break an artist. It's really when  
8 you cross over from the unknown to the known.

9 ARBITRATOR VON KANN: Is that point  
10 measurable, for example, in sales of records? Do you  
11 say, "After 100,000 CDs, we -- we've broken it"? Is  
12 there an objective measure?

13 THE WITNESS: There are objective measures  
14 that are based on each individual project, and it's --  
15 certainly, if you're talking about something like a  
16 mainstream pop act, if you only sold 20,000 records,  
17 let's say, you would consider that to be a stunning  
18 failure. But if you had a punk band that, you know,  
19 you figured had very limited crossover commercial  
20 potential, 20,000 records actually might be very  
21 successful.

22 So, yes, there are criteria that you can

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1 use, but it's based, really, on the individual  
2 product.

3 BY MR. STEINTHAL:

4 Q Mr. McDermott, there was some testimony  
5 earlier in the case that certain webcasters that offer  
6 a multiplicity of different kinds of stations have  
7 been looked at almost like the small market stations  
8 or college radio stations in the broadcast spectrum,  
9 insofar as they give an opportunity to have a wider  
10 play list and a deeper play list for artists that more  
11 conform to a niche.

12 A I'm sorry. Could you more specifically  
13 characterize or name what you mean by what -- who  
14 you're talking about?

15 Q For example, let's assume we have a  
16 webcaster that offers, you know, 40 or more  
17 different --

18 A SonicNet?

19 Q SonicNet. Take SonicNet.

20 A Okay.

21 Q And it has programmers that have  
22 experience in broadcast radio, and they've put

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1 together channels that are more geared to a specific  
2 demographic. And, indeed, there was testimony from  
3 someone -- Quincy McCoy from SonicNet, who you may  
4 know. Do you know Quincy?

5 A We've sat across the table a few times.

6 Q And he was analogizing, to some degree,  
7 the smaller market stations that have been used as  
8 test beds, if you will, to break new artists by record  
9 companies, at least to try to get air play in niche  
10 areas with certain kinds of stations that are  
11 available on a webcaster like a Radio SonicNet.

12 Is it fair to say that the play list  
13 flexibility that a webcaster like SonicNet has for the  
14 niches that it offers is comparable to the play list  
15 flexibility that a smaller market radio station has?

16 A Probably not. College -- even college  
17 radio stations do have play lists. There is a certain  
18 amount of flexibility. But in order to be successful,  
19 if you had every person -- on a station that would  
20 have any responsibility to success, if you had a  
21 station where you had no idea what was going to be  
22 played on that station at any given time, it would

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1 inherently, by that very nature, be unsuccessful  
2 because it would be such a potpourri of music that I  
3 don't know that -- how that would appeal to anybody.

4 I mean, if you heard the Sex Pistols this  
5 hour, and then the next hour you heard, you know,  
6 Beethoven, I don't know who that would necessarily  
7 appeal to.

8 Q Well, but take for the assumption that you  
9 were simply, on a given channel, limiting your play  
10 list to a discrete niche, not going from classical to  
11 the Sex Pistols, but the Sex Pistols and a whole bunch  
12 of other, you know, pop bands or alternative rock  
13 bands that may not have the same notoriety as the Sex  
14 Pistols but are of the same milieu and the same niche,  
15 wouldn't it be the case that the greater flexibility  
16 they have with play lists in terms of what they can  
17 offer makes them -- those webcast channels that are  
18 oriented that way -- similar in many respects to the  
19 kinds of college radio stations and other kinds of  
20 stations that have been used by the labels as test  
21 beds, for example?

22 A I have a difficult time making analogies

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1 between what someone like SonicNet does in terms of  
2 offering a tremendously deep amount of genres that are  
3 very niche-oriented -- one-stop shopping for all of  
4 that -- and a college radio station.

5 Q Have you done -- I'm sorry. I was going  
6 to ask whether you've done any comparison of the  
7 actual play lists on stations like Radio SonicNet has  
8 in the alternative rock area and what you might find  
9 at the Ithaca College radio station, for example,  
10 which is near and dear to my heart, since my son works  
11 there.

12 (Laughter.)

13 A I listen to -- I listen to a fair amount  
14 of webcasting because it interests me, not just  
15 because it has bearing on today's proceedings. And I  
16 am also a big fan of radio, and I would say that to me  
17 webcasting and what terrestrial radio stations do is  
18 -- is a very, very different experience.

19 And I have a difficult time, having spent  
20 a lot of time playing around with both, drawing a lot  
21 of concrete analogies between the two in terms of  
22 programming.

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1 Q Let me ask you --

2 A You don't often get somebody -- well, you  
3 never get it on SonicNet. But you don't often get a  
4 DJ talking about how they broke up with their  
5 girlfriend, so they're going to play some angry song  
6 by Black Flag, you know.

7 Q Well, let me ask you this --

8 A Unlike college radio.

9 Q -- I was struck by the comment in your  
10 written statement that DJ patter was promotional.  
11 Have you also heard it publicized in the trades that  
12 people get tired of hearing the DJs just go on and on  
13 and on about irrelevant things, and, therefore, often  
14 switch stations precisely because of the moronic DJ  
15 patter that's out there?

16 A Again, I've been in the record business  
17 most of my adult life. I mean, I'm 36 and I've been  
18 in the business since 1984. I remember the days when  
19 a DJ like Scott Muny in New York -- I wouldn't  
20 characterize -- or Vin Skelsa. I wouldn't  
21 characterize what they said about our music as patter  
22 or -- or -- like the radio stations in New York now I

1 think what turns people off are these DJs who do all  
2 this kind of shock stuff and yell and scream at  
3 people.

4 That turns me off. That has nothing to do  
5 with music. That's, you know, the Howard Stern kind  
6 of a thing I think is probably what people are more  
7 talking about. When it -- when you have somebody who  
8 really knows music and talks about it, and you trust  
9 them, that to me is not patter.

10 Q That's a big "if," though. Let's take,  
11 for example, morning drive time with Z100 or some  
12 other pop station like that. You'd agree with me that  
13 the kinds of patter that you're getting on major  
14 broadcast stations in drive time is not about the  
15 music, it's about what's happening in the world or  
16 what's happening in their sex lives or whatever it may  
17 be, and that has turned a lot of people off, hasn't  
18 it?

19 A Yeah, I'd agree with that.

20 Q Now, you mentioned in your initial answers  
21 to some questions about background that you've been  
22 involved -- and I think it was when you were at

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1 Polygram -- in the development of policies on the  
2 internet or in connection with the internet. What  
3 kind of policies were you involved in generating in  
4 that area?

5 A Promotional and commercial uses of our  
6 intellectual property in the new media space.

7 Q What kind of policies were created with  
8 respect to that?

9 A There --

10 MR. NEWBERG: I'm just going to ask, are  
11 you talking about Polygram policies or Sony policies?

12 MR. STEINTHAL: Really, either. I'm  
13 curious what policies, in his experience at either  
14 Polygram or Sony, have been developed in connection  
15 with internet music --

16 MR. NEWBERG: There are -- I believe his  
17 testimony only refers to his policy creation at Sony.

18 MR. STEINTHAL: All right. We'll stick  
19 with that.

20 BY MR. STEINTHAL:

21 Q What kind of policy areas have you been  
22 involved in creating with respect to internet?

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1           A       I could speak generally in terms of  
2 ideology. But in terms of specific policies in an  
3 open forum, that's -- some of that is proprietary to  
4 Sony.

5           CHAIRMAN VAN LOON: What we can do, in the  
6 interest of full information, it's a very simple  
7 matter for us to go into closed session. And, for  
8 example, the part of your testimony that deals with  
9 some of the specific Sony one-off deals with  
10 individual casters, that's all in as restricted  
11 information. And certainly, when we come to that  
12 point, we'll do it in restricted.

13           So we could -- we can go on a restricted  
14 record right now, so that you can feel comfortable  
15 about talking about Sony policies without that  
16 becoming part of the public record.

17           MR. GARRETT: I think we should go into  
18 restricted session.

19           ARBITRATOR VON KANN: And that means it's  
20 not public, and there's a limited audience of people  
21 who will have access to it.

22           CHAIRMAN VAN LOON: Right. And it also

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1 means that the -- everyone who does have access is --  
2 has signed agreements and is limited, and the Court  
3 Reporter's record of this -- of our overall hearing  
4 doesn't include these pages, the part that's filed  
5 public -- that is available to the public to review.

6 So, John, if we could go on restricted --  
7 or closed session.

8 (Whereupon, at 9:41 a.m., the proceedings  
9 went into Closed Session.)  
10  
11  
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22

1 BY MR. STEINTHAL:

2 Q Now, the labels do special promotions on  
3 broadcast radio, do they not? Separate and apart from  
4 generating air play, they do giveaways and contests  
5 and promotions to, you know, help launch the new  
6 release of an album, for example, correct?

7 A Yes.

8 Q And what are the nature of those kinds of  
9 promotions and the benefits that you think are derived  
10 from those kinds of promotions?

11 A Well, there's a -- when I first started  
12 working for a record label back in 1987 there was a --  
13 there was a poster that was up when I walked in the  
14 lobby and it said, "A funny thing happens when you  
15 don't market. Nothing." And there was a picture of  
16 a desert island.

17 We -- the nature of those and what we get  
18 from those kind of promotions is this is show  
19 business. And when you have a really good record, and  
20 you attach those promotions around it and those  
21 events, it just raises the element of show business,  
22 and it becomes more attractive to people.



1                   So a big part of what we do now in the  
2 music -- the movie industry I think does very similar  
3 things as well -- is we try to make records, certain  
4 types of records, into events, so that people pay more  
5 attention to them.

6                   Q       And when you talk in your written  
7 testimony about a series of I think what you call one-  
8 offs that you've done with MTV and other webcasters --

9                   A       Yes, sir.

10                  Q       -- are those one-offs similar in kind to  
11 the kinds of promotions that you're talking about that  
12 you do on radio upon the release of an album, where  
13 it's not so much focused on getting into a play list  
14 as it is focused on getting people's attention about  
15 a new release and a driving promotion associated with  
16 that new release?

17                  A       There are elements that are similar,  
18 certainly, obviously. There are things, though, that  
19 we get in these kind of promotions that we would never  
20 get from a regular radio station, things like links  
21 directly to artist sites, so that people can go right  
22 to the artist's website.

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1                   In a lot of cases, we actually -- when  
2                   people participate in these contests, as you can see  
3                   in some of the attachments, in all of the attachments,  
4                   we get their e-mail addresses. We give consumers the  
5                   opportunity to find out more about that artist. And  
6                   when we go --

7                   MR. NEWBERG: If I could just interrupt  
8                   for a second. If you feel that any of this should be  
9                   on restricted, just please let us know.

10                  THE WITNESS: Okay. So there are similar  
11                  parts to it, but there are also other things that we  
12                  get that we would probably never really get in the  
13                  terrestrial world, or it would be difficult to get in  
14                  the terrestrial world.

15                  BY MR. STEINTHAL:

16                  Q       Difficult in part because the terrestrial  
17                  world doesn't just have that kind of information or  
18                  data to give, right?

19                  A       Or it would be laborious for them to get  
20                  it. I mean, I -- in the old days when I used to do  
21                  retail marketing, we would do a contest and I'd get a  
22                  big box with people's names written on a little slip

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1 of paper. And, you know, you'd get a box at the end  
2 of a promotion with all of the stores. You'd have,  
3 you know, Hefty bags full of names.

4 Then you had to go to the intern down the  
5 hall and go, "Could you take these three Hefty bags  
6 and put them on index cards?" You know, the  
7 technology is obviously a lot easier when you're  
8 dealing with databases and you just click a button and  
9 put in your e-mail address, so, yeah.

10 Q And on both the promotions we've been  
11 talking about in broadcast radio and these one-offs on  
12 the internet, the reality is that in the ordinary  
13 course there's no cash that changes hands on that.  
14 You're providing the requisite content, if you will,  
15 for the promotion in --

16 A Online or offline?

17 Q Both.

18 A There have been some examples in the  
19 online world, mostly outside the United States, where  
20 we have actually gotten financial compensation for  
21 those promotions.

22 Q But otherwise, it's pretty much no cash,

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1 no cash, right?

2 A If you're asking -- if the question is  
3 specific to cash, yes. But I don't want to  
4 characterize cash as being the only value that we  
5 might want to get in kind, because there is quite a  
6 sizeable amount of value that we get in other areas,  
7 which, again, I --

8 Q Which you talk about in your testimony.

9 A Yes.

10 Q Okay. One of the experts in this case  
11 said something about repetition that seemed a little  
12 bit inconsistent with your testimony about it, so I  
13 just want to draw your attention. I'm going to read  
14 to you from paragraph 42 of one of the RIAA's rebuttal  
15 statements.

16 A Could I get a copy of that, so that I  
17 could look at it for myself and understand the  
18 context?

19 Q Sure. This is from Mr. Schink, his  
20 rebuttal statement. And in particular -- I'll show it  
21 to you -- but at the end of paragraph 42 he talks  
22 about sales losses because people heard the album and

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1 did not like it or because they were overexposed to  
2 the album through repeated radio plays, i.e. they  
3 heard it too often and lost interest in purchasing it.

4 And I just wonder whether you would agree  
5 that there is some actual detrimental impact  
6 associated with too much repetition on broadcast  
7 radio.

8 A Do you know where exactly it is?

9 Q It's in paragraph 42 at the very --

10 A Oh, here we go. Could you just give me a  
11 moment?

12 Q Sure.

13 A I'll try to read it as quickly as  
14 possible.

15 (Pause.)

16 So what -- how would you like me to -- in  
17 what context do you want me to respond to this?

18 Q I'm just curious whether you agree with  
19 the suggestion that too much repetition can be  
20 displacing, because people hear too much of what they  
21 want to hear and they don't want to hear it anymore.

22 A I think that those circumstances are

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1 fairly unique. There certainly have been times when,  
2 let's say, there was a point when Hootie and The  
3 Blowfish was really getting on my nerves, because they  
4 just played Hootie and The Blowfish so much, and you  
5 saw them every time you turned on TV.

6 But those kind of -- or you could say the  
7 same about Madonna or in the '80s when Michael  
8 Jackson's Thriller came out. It seemed like all media  
9 was saturated with Michael Jackson. And at that  
10 point, yeah, you know, at some point people will get  
11 tired of that. At some point. But before they got  
12 tired of that, we sold many, many, many millions of  
13 records, and people had a voracious appetite.

14 So in order to get to the point where  
15 things are overexposed, there has to -- the voracious  
16 appetite has to exist to begin with.

17 Q Okay.

18 A And I would also say I'm not familiar with  
19 the gentleman who brought this up as testimony, and I  
20 don't know what context he made this in, so I  
21 apologize that I can't give a more -- an answer that  
22 more applies to what -- the point he was trying to

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1 make --

2 Q Okay.

3 A -- because I don't know what point he was  
4 trying to make.

5 Q Fair enough.

6 ARBITRATOR VON KANN: Well, is there, in  
7 this area, sort of a -- kind of a typical life cycle,  
8 if you were, that once you break the band and you get  
9 the big stations playing it, and you want that  
10 repetition, and you want a lot of air play, and it  
11 promotes sales, and it's on there for two weeks, four  
12 weeks, six weeks, eight weeks, 10 weeks, I don't know,  
13 some -- at some period of time it probably, I would  
14 have thought, eventually begins to run its course, and  
15 the sales begin to decline a little, and you're ready  
16 to push something else, and the added repetition is  
17 having sort of diminishing -- you know, the law of  
18 diminishing returns is setting in. I don't know  
19 whether that's 40 weeks or 80 weeks or what it is. It  
20 probably varies from artist to artist.

21 But there comes some period of time when  
22 I would assume it's sort of tailing off, and now it's

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1 time to find something else to stick on there  
2 constantly. Is that sort of the way it works?

3 THE WITNESS: Yes, sir. And that ebbs and  
4 flows depending on what a single is. You might have  
5 a really big single that lasts for months and months  
6 and has recurrent air play. And then that starts to  
7 go away and you're trying to push the new single.

8 ARBITRATOR VON KANN: What is it -- if you  
9 can -- and it probably varies a lot from genre to  
10 genre, but is there sort of a -- what is the typical,  
11 you know, period of time you think you've got to  
12 really -- to have a lot of air play and a lot of  
13 sales? Is it sort of a -- you know, four months is  
14 kind of a standard length or two months or six months?  
15 Or what is kind of the typical moment in the sun for  
16 a given record that is getting a lot of air play,  
17 getting a lot of sales, and then beginning to tail  
18 off?

19 THE WITNESS: A big record could be  
20 several months of activity, and then it will -- if it  
21 was a really big record, it will go into kind of a  
22 recurrent situation on the radio station. If the

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1 radio stations are still getting feedback in their  
2 callouts -- they do a lot of research -- they'll  
3 continue to play it for a longer period of time.

4 But we can be on and off records literally  
5 from week to week. I've been in meetings where a  
6 record was huge this week and then we -- we went out  
7 and we did research, and the research came back, "This  
8 isn't going to pop." So we moved to the next record  
9 really quickly.

10 But a successful record, best case  
11 scenario, probably three months.

12 ARBITRATOR VON KANN: Okay.

13 BY MR. STEINTHAL:

14 Q Mr. McDermott, at pages 4 --

15 CHAIRMAN VAN LOON: Let me just -- excuse  
16 me. When you say "week to week" or "best case three  
17 months," am I understanding correctly you're talking  
18 about the length of time that Sony, for example, would  
19 really be pushing a record? You might decide, well,  
20 this is -- three months is enough, and the radio  
21 stations might still play it a lot, even --

22 THE WITNESS: Yes, sir.

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1 CHAIRMAN VAN LOON: -- even though you're  
2 not pushing it.

3 THE WITNESS: As a matter of fact, I  
4 assume everybody probably recalls when there was the  
5 Latin explosion in the music industry a couple of  
6 summers ago, and Ricky Martin La Vida Loca was the  
7 theme, really, of the summer, which was great because  
8 it was a Sony record.

9 (Laughter.)

10 But we had subsequent singles that we  
11 wanted to work, but they only wanted to be about La  
12 Vida Loca. And when our promo reps went and actually  
13 tried to get them to move on to the next single, the  
14 public wanted that record, so we had to wait.

15 And as a result, a lot of the marketing  
16 that we did behind that, you know, because you buy  
17 print ads, you commit ahead of time because there's  
18 such long lead times on advertising, advertising a new  
19 single, and we had to rush and, you know, put all of  
20 that stuff aside, delay all of it.

21 BY MR. STEINTHAL:

22 Q Mr. McDermott, you state in your written

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1 testimony, starting at page 3 under the caption  
2 "Webcasters Promotional Claims," you talk about  
3 various features that the webcasters have claimed to  
4 be promotional and state that in your view they are  
5 not promotional. Is that a fair summary of that part  
6 of your testimony?

7 A Absolutely.

8 Q Are you aware of any data that supports  
9 the view that the specific features that you've  
10 referred to are not promotional?

11 A Not off hand. The business -- our  
12 business is based a lot on instinct, and it's about  
13 keeping your ear to the ground. It's about watching  
14 consumer habits, and it's about living a lifestyle.

15 So I think in any creative industry you  
16 have to have those instincts and get a feeling for  
17 where you think things are going, because if you wait  
18 for -- there is no manual that says how to make --  
19 here's a hit movie, how to make a hit record, how the  
20 record industry is going to evolve. You have to look  
21 at the signs, and that's based on doing this for the  
22 past eight or nine years.

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1           That's why I so fervently believe that it  
2           is not -- that this functionality -- and I assume,  
3           tell me if I'm wrong, that you're referring to --  
4           we're starting to get into things like the skip  
5           functionality and personalization.

6           Q       Well, it's all the features that you refer  
7           to in Section 2 of your testimony, including not just  
8           the skip features but the chat rooms, the ability to  
9           play deeper in play lists, and the like. And I guess  
10          my question -- and you've already answered it to some  
11          degree -- let me ask you separately. Did you seek to  
12          generate data to support the proposition that these  
13          features did not have a promotional benefit to the  
14          label community?

15          A       No. I think that what we did was -- and  
16          what you do every day in this business because it  
17          changes so quickly -- again, is you make calculations  
18          based on your experiences and what's happening in the  
19          industry.

20                 If I were to look at the two main research  
21          firms' statements about how the music industry was  
22          going to evolve -- the digital music space was going

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1 to evolve, those two main researchers being Forrester  
2 and Jupiter, and look at all of their projections,  
3 nearly all of their projections about everything in  
4 this space have been wrong for the past five or six  
5 years.

6 And we've had instincts which completely  
7 contradicted what their projections were, and our  
8 instincts were right. So I have a very high degree of  
9 confidence in what our determinations about how this  
10 space is going to evolve is.

11 Q And the Jupiter you're referring to is  
12 Jupiter Media Metrix?

13 A Jupiter Communications, their research  
14 reports on the music industry. Both they and  
15 Forrester do a tremendous amount of research into  
16 space.

17 ARBITRATOR VON KANN: Jupiter we've heard  
18 of. Forrester I don't think I have. Who are they?

19 THE WITNESS: Forrester Research is  
20 another one of these -- they're analogous to --  
21 they're a little bit more officious than Jupiter.

22 BY MR. STEINTHAL:

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1           Q       Now, in your discussion of features of  
2       webcasting that are non-promotional, I don't think you  
3       talked about the buy buttons that many webcasters  
4       have. You would agree, would you not, that the  
5       presence of a buy button does have the ability to  
6       facilitate impulse buying?

7                   MR. NEWBERG:       Just as a point of  
8       clarification, there is some small discussion of buy  
9       buttons on the top of page 7.

10                  CHAIRMAN VAN LOON:   Page 7?

11                  MR. NEWBERG:   Yes, the top of page 7.

12                  THE WITNESS: I would certainly agree that  
13       by having a buy button there it creates an opportunity  
14       for a sale. Unfortunately, it has not turned out that  
15       it actually generates significant sales, in my  
16       experience, and I have some very specific experiences  
17       with buy buttons and the end result. And it's nothing  
18       to get too excited about.

19                  BY MR. STEINTHAL:

20           Q       Have you done an analysis of the pricing  
21       for a lot of the online merchants against the pricing  
22       available in brick and mortar stores?

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1           A       Yes.    You know, I think generally the  
2       online merchants try to offset the fact that there  
3       isn't the instant gratification of walking out of a  
4       store with a product, and the fact that, you know,  
5       they have shipping costs.   And they try to usually  
6       have the prices of their products be lower than they  
7       would be at retail.

8                       But then, when you factor in things like  
9       shipping and handling, it probably ends up being right  
10      about the same price as retail.   That's one of the  
11      reasons why online retailers are always coming up with  
12      different kind of promotions, like buy two get one  
13      free, 40 percent discounts across the board, that kind  
14      of stuff.

15           Q       Now, in reaching the conclusions -- strike  
16      that.

17                       On page 4, at one point you suggest that  
18      webcasting can actually be displacing of CD sales.   Do  
19      you remember testifying to that effect?

20           A       Yes.

21           Q       Well, let me ask you the same question I  
22      asked you before on that.   Did you have any data that

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1 you consulted or sought to generate on that subject?

2 A No, although I can tell you that that is  
3 -- that ideology is a thread that runs through the way  
4 we do business in this whole space. We are in an era  
5 where we feel very strongly that the physical good is  
6 going to go away, and we're not going to be a widget  
7 company. We're going to be an intellectual property  
8 company.

9 And trying to figure out a way to monetize  
10 all of this new access and availability to content is  
11 really what my game is about on a day-to-day basis.  
12 I mean, to be honest with you, the selling of CD sales  
13 as a result of all of this stuff is really not why I'm  
14 doing this, and it's not really my charge.

15 My charge is to figure out when the CD  
16 sales go away, and this is our business. How do we  
17 pay the artists? How do we stay in business? You  
18 know?

19 Q Are you talking about the digital  
20 distribution business?

21 A As a -- yes, as a general space.

22 Q Right. That's what I thought.



1 Well, let's focus on just webcasting for  
2 a moment, not digital downloads, not on-demand  
3 streaming, not companies like Pressplay or MusicNet  
4 that provide for the distribution of timed-out  
5 downloads, etcetera. Let's put all that aside and  
6 just --

7 A Okay. Well, I understand that, but my  
8 comment applies to webcasters as well.

9 Q Okay. Well, what I want to do is focus on  
10 what, if any, data that you are aware of to support  
11 the notion that webcasting, as it exists today,  
12 subject to the DMCA performing rights complement and  
13 -- performance complement and the other limitations of  
14 the statute, whether such webcasting actually  
15 displaces record sales. Are you aware of any data  
16 that supports that?

17 MR. NEWBERG: If you understand what the  
18 performance complement is.

19 THE WITNESS: I was about to say I'm not  
20 an expert on all the ins and outs of the performance  
21 complement. But if you are -- there seems to be kind  
22 of a thread that you keep asking me for supporting

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1 data for all these conclusions, and I guess as a  
2 general response to that question I doubt when the wax  
3 cylinder was invented that the person who invented it  
4 knew that Sony was going to have over a billion  
5 dollars in turnover in 1999.

6 We try to look at supporting research for  
7 all of these conclusions. But, again, it's more about  
8 feel. It's more about the instinct. It's more about  
9 meeting with multitudes of customers, not only  
10 webcasters or potential new partners, not only  
11 webcasters, but digital download providers,  
12 subscription services, lots of different types of  
13 media partners, and just kind of taking this -- all  
14 this opportunity and figuring out, well, if all of  
15 this opportunity -- if any of it connects, where do  
16 you end up going?

17 I think it would be naive of anyone to  
18 think that because of all of this ease of distribution  
19 we weren't going to start moving away from a physical  
20 good world.

21 BY MR. STEINTHAL:

22 Q And all I'm asking you to do, and I really

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1 think it's important for this proceeding to do this --

2 A Okay.

3 Q -- is put aside digital downloads, put  
4 aside on-demand streaming, and just limit the question  
5 to the radio-like streaming of music on the internet  
6 subject to the limitations of the compulsory license.  
7 And my question is whether you're aware of any data  
8 that supports the proposition that that kind of music  
9 streaming either has resulted in or will result in any  
10 loss of CD sales to the label community, by the end of  
11 next year, for example.

12 A Not any specific research. But when you  
13 mentioned radio-like, I just want to clarify, are you  
14 talking about terrestrial rebroadcasters when you say  
15 "radio-like"? Or are you talking about webcasters  
16 that aren't terrestrial?

17 Q I'm talking about both. Is your answer  
18 any different if it's both?

19 A Well, I would just say that those are two  
20 different types of certainly content plays, so I just  
21 wanted to know what you were referring to.

22 Q And my answer is -- my question is, would

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1 your answer be any different knowing that I meant  
2 both?

3 A No, I just wanted to understand the  
4 question.

5 Q Now, it talks about -- or you talked about  
6 the long-term sort of fear or concern that you're  
7 going to be moving out of the traditional CD  
8 marketplace. Is that a fair statement?

9 A I wouldn't characterize it as a fear. It  
10 is certainly part of our business strategy that the  
11 physical good is going to go away at some point, and  
12 we are an intellectual property business. How that  
13 gets carried or how it gets delivered is really  
14 irrelevant.

15 But if it's just bits, we've got to get  
16 paid for the bits. I think there's an unfortunate  
17 perception that the value of music is really based  
18 around the cost of the physical carrier. So we've got  
19 a much -- and that's a burden that we kind of carry  
20 into other places, which is what we're trying to  
21 change.

22 Q Well, you were in the media business when

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1 the VCRs first came out, were you not?

2 A No, I was in junior high school. But --

3 (Laughter.)

4 Q Okay. Were you at your first mom and  
5 pop --

6 A Not yet. Not yet. But I remember when  
7 they came out, and they were about this tall and they  
8 weighed about 200 pounds.

9 Q Well, in the context of your current job,  
10 has it come across in discussion internally at Sony  
11 that there were similar fears at the point in time  
12 when the VCR came out that people would just rent  
13 movies, watch them at home, and it would have a  
14 negative impact on the theatrical distribution  
15 marketplace?

16 A I know this analogy comes up endlessly  
17 when it comes to digital -- the digital distribution  
18 space, the VCR, and how great it was for the record  
19 industry -- the movie industry. But in renting a  
20 movie you still have the act of getting in your car,  
21 going and picking it, hoping that they have everything  
22 that you're looking for, standing in line with a bunch

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1 of other people, getting it home, getting the chance  
2 to watch it, dealing with the late fees, returning it,  
3 all of that kind of stuff.

4 This is a very different space than that.  
5 There isn't that physicality attached to it. So to  
6 make analogies to something that to me exists very  
7 much in the analog world, and try to make those  
8 analogies in the digital world, to me is an  
9 inappropriate comparison.

10 Q But it does come up from time to time  
11 internally at Sony, does it not?

12 A No. It comes up as a -- are we going to  
13 hear another pitch where somebody tries to compare the  
14 digital media space to the VCR business?

15 Q Okay.

16 ARBITRATOR VON KANN: Can I just ask you  
17 about this notion that we are moving -- what you seem  
18 to be saying, which seems to make sense to me, is that  
19 at some point down the road, 20 years from now, 10  
20 years from now, who knows, your record is not -- your  
21 business is not going to depend upon the sale of how  
22 many little metal discs you've sold but how many songs

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1 you have sold, probably transmitted in some digital  
2 fashion.

3 That does not strike me as bad. Indeed,  
4 it looks to me like there could be tremendous  
5 advantages to that. All of the expensive production  
6 stuff generating all of those little discs and studios  
7 and records, you know, shipping and all of that,  
8 disappears.

9 I would have thought potentially the costs  
10 go down dramatically and that, indeed, you know, the  
11 record companies might be looking forward to this as  
12 a golden era when it's going to be much cheaper to get  
13 our songs out in this vehicle. Our production costs  
14 will go down, our manufacturing costs.

15 So long as we can make sure that we've got  
16 good, solid distribution mechanisms, be they Pressplay  
17 and -- what's the other one? MusicNet or something  
18 else -- that we will be able to capitalize on it.

19 So when you speak about we're moving away  
20 from a physical products to an intellectual property  
21 business, which seems to me to be inevitable, from our  
22 point of view, where we're supposed to be looking at

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1 the potential promotional or displacement effects, it  
2 seems to me we maybe we should be -- maybe I have been  
3 thinking about this too narrowly.

4 Maybe the question isn't, will webcasting  
5 increase or decrease the sale of little pieces of  
6 plastic discs? Will it increase or decrease the sale  
7 of songs? Sound-recorded songs. Perhaps transmitted  
8 digitally as opposed to through a piece of plastic.

9 And I guess I'm wondering whether you have  
10 at Sony at this point any data about that. Sony has  
11 -- let's break it up if I can into -- some of the  
12 companies -- I can't remember whether Sony is one --  
13 have licensed some interactive services, correct?

14 THE WITNESS: Yes, sir.

15 ARBITRATOR VON KANN: Has Sony done that?

16 THE WITNESS: Yes, sir.

17 ARBITRATOR VON KANN: So there are some  
18 number of people who are downloading your music, and  
19 you're getting royalties from that.

20 THE WITNESS: We will be, yes, sir.

21 ARBITRATOR VON KANN: And Sony is  
22 participating probably, or plans to, in one of these

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1 two, MusicNet or Pressplay?

2 THE WITNESS: Yes, sir. And licensing to  
3 a whole host of folks as well.

4 ARBITRATOR VON KANN: And licensing. It  
5 may be too early to tell at this point, but do you  
6 have any sense at all that although maybe,  
7 hypothetically, revenue is beginning to decline a bit  
8 from the sales of little plastic discs, compensating  
9 revenue is increasing from the sales and the royalties  
10 through digital transmission. Is that beginning -- is  
11 anybody -- have you analyzed that yet at Sony?

12 THE WITNESS: The difficult thing since  
13 Sony -- actually, Sony Music was the first company to  
14 start selling digital downloads, legitimate commercial  
15 digital downloads, back in April of 2000. The  
16 difficult thing is because there have been so many  
17 illegitimate alternatives, it's very difficult to  
18 convince consumers that there is enough value there to  
19 actually pay anything.

20 So we have seen, particularly in markets  
21 outside the U.S., in Europe, the CD burning business,  
22 particularly in companies like Germany -- the German

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1 company has been -- I don't have the specific numbers,  
2 unfortunately, but the managing director of Germany  
3 characterized it the last time I met with him as his  
4 business was decimated by the CD burning business.

5 We, as an industry, have been flat. So  
6 the difficult thing is with things like Napster --  
7 and, obviously, one of the reasons why we fought that  
8 battle so hard was we were trying to create something  
9 legitimate, and there was all this discussion about,  
10 well, maybe Napster is legitimate, and maybe it's not.  
11 And while that was happening, consumers had a choice  
12 of either paying, you know, \$1.99 for one of our  
13 downloads, or going onto Napster and getting every  
14 piece of music in recorded history for free.

15 So it was -- it's difficult to show that  
16 the revenue that you mentioned going up is actually --  
17 has actually been going up. Part of the reason why I  
18 was eager to come down here and testify was there's a  
19 lot of discussion about how this -- these types of  
20 services are promotional for the physical good.

21 And what worries me about that is we're in  
22 a time now where there isn't this hard data written on

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1 a piece of paper that says the physical good is in  
2 trouble to the degree maybe that would make it  
3 absolutely crystal clear.

4 And there's this argument that it's --  
5 that this is promotional. If it's promotional of a  
6 physical good, and the physical good goes away, and  
7 the rate has been predicated on the fact that this is  
8 promoting physical goods, and then this turns into the  
9 business, we're in trouble.

10 ARBITRATOR VON KANN: Because we don't --  
11 this may be -- maybe this will be a legal question for  
12 counsel. I'm not sure. I'm not sure we have to limit  
13 our analysis to what -- what impact does webcasting  
14 have on the sale of physical goods. It may be that if  
15 people listen to streaming and like it, they flip over  
16 to Pressplay and buy it, or some other service for  
17 which you get revenue income.

18 So it may be that, you know, to -- it  
19 seems to me you are bound to be correct that we are --  
20 we are gradually moving out of the CD era. Whether  
21 it's two years, five years, I don't know what, but  
22 we're bound to be moving out of it into a digital era.

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1           THE WITNESS: Which I think is -- which  
2           will be difficult the more interactivity and  
3           functionality is part of a baseline service, because  
4           the more functionality you include it becomes more  
5           substitutional, and there is less reason for a  
6           consumer to move to a different product, which the --  
7           the main selling point is increased functionality or  
8           selection.

9           ARBITRATOR VON KANN: Let me ask you one  
10          other thing. You said you're not aware at this point  
11          of any data that would support the proposition that  
12          the physical good is in trouble, although I think you  
13          instinctively feel it is. You also said that you are  
14          aware of sales that have been generated by buy  
15          buttons, and it's nothing too exciting.

16          But does Sony have some way of knowing  
17          when, I don't know, some number of records gets sold  
18          through Amazon.com, that that came in through buy  
19          button services as opposed to on a webcasting service,  
20          as opposed to I guess somebody going directly to  
21          Amazon.com and ordering? Do you have any way of  
22          telling what sales have been generated by buy buttons

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1 on these web streaming services?

2 THE WITNESS: Well, there's two ways that  
3 we could tell, so, yes. One is when we are dealing  
4 with people like Amazon or CDNow, they will say to us,  
5 not down to the very specific because they -- it would  
6 be inappropriate to disclose that. But they will say,  
7 "X percentage of our business comes from click-  
8 throughs." They might say, "X percentage of our  
9 business comes from click-throughs from webcasters."

10 The other way that we would have of  
11 knowing is by setting up a promotion ourselves which  
12 had a buy button on it.

13 (Whereupon, at 10:20 a.m., the proceedings  
14 went into Closed Session.)

15

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1 THE WITNESS: And is there a particular  
2 page you'd like me to refer to?

3 BY MR. STEINTHAL:

4 Q It's very general, so I don't think we  
5 need to refer to it.

6 A Okay.

7 Q But in your testimony that we've already  
8 started to talk about a little bit -- about potential  
9 displacement concerns associated with webcasting.

10 A Right.

11 Q Did you consider or factor in in reaching  
12 your conclusions or giving your opinions the  
13 difference between the CD quality of the transmission,  
14 of course, that a purchase of a physical CD provides  
15 and the much less than CD quality that most of the  
16 webcasters transmit their music at?

17 A No. And the reason why we don't consider  
18 that is I've seen the technical limitations over the  
19 past five years when streaming first started. It  
20 sounded terrible. It didn't work particularly well.  
21 And the technical advances in sound quality, in  
22 compression, the goal posts move every few months.

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1 And I'm very highly confident that in a -- within the  
2 next few years, particularly as high bandwidth  
3 penetration increases, that a better than analog radio  
4 sound quality will be available to people on the  
5 internet.

6 So if I predicated my deduction of value  
7 on the fact that the sound quality wasn't good, I  
8 would be living in a moment in time, which in my  
9 experience is a moment that lasts for a few months.

10 Q Well, you would agree that as of now, for  
11 the period from the past up until the moment we're  
12 sitting here today, the vast predominance of streamed  
13 music by webcasters is at bit rates that are under  
14 30K, right?

15 A I myself, because I have a DSL connection,  
16 I listen to 128K streams all the time, and they sound  
17 pretty darn good. There are plenty of -- we live in  
18 a world right now where, obviously, people have 56K  
19 modems, and they can't get 128K content. So they have  
20 to listen at very low bit rates.

21 But there is a tremendous amount, an  
22 increasing amount of high bandwidth content available

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1 that I think sounds very good.

2 Q So is your concern about displacement,  
3 again, one of those concerns about where we're going  
4 to be going and at a point in time when people can get  
5 CD quality music on the internet from webcasters?

6 A Yeah, I'd say that's part of it.

7 Q Now, in your discussion about the skip  
8 functionality and concerns you had about that  
9 functionality in terms of its displacement, potential  
10 displacement effect, let me ask you this. Would you  
11 agree with me that there's a difference between  
12 skipping to a song you know and merely skipping to  
13 avoid a song that's currently streaming, but when you  
14 don't know what the next song is going to be?

15 A If I knew exactly -- if I knew -- if there  
16 was a play list that said, "Twenty songs from now is  
17 Led Zeppelin," and I wanted to hear Led Zeppelin, it  
18 would be certainly easier to click to exactly the song  
19 I want to hear. Did that answer your question?

20 Q Well, maybe it did. Assume for the moment  
21 that you don't know what the play list is, because  
22 it's not published, and you're on a genre-based

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1 station that has a lot of different artists and songs,  
2 and you don't know the next song or the -- you know,  
3 song three away from you.

4 Would you agree that the ability to skip  
5 is less displacing than it would be if you were in a  
6 situation where it was streaming on demand and you  
7 knew what the next song was?

8 A Skipping, in general, is hugely  
9 substitutional. Our songs are like little commercials  
10 for an artist. Any time you enable somebody to skip  
11 those little commercials and not hear it, the reason  
12 -- one of the reasons why terrestrial radio is so  
13 promotional is you're stuck there in your car, and  
14 you've got to listen to that song, and you have to  
15 deal with it. You could change the station if you  
16 want to, but you have to wait.

17 Q Well, let me ask you that. I mean, what  
18 is the fundamental difference between, "Gee, I don't  
19 like this song, and I'm in my car" and pressing a  
20 button to skip to a song on another station, and "I  
21 don't like this song on the internet," and skipping to  
22 get to the next song, not knowing what it's going to

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1 be?

2 A Well, one is is that you're -- are you  
3 really -- I guess you're asking, what's the difference  
4 between the analog and the digital world?

5 Q No. I'm asking solely as to a skip  
6 functionality what the difference in the displacement  
7 effect is between having the ability to skip from one  
8 radio station to another when you don't like a song,  
9 or from one preset button on your home FM stereo to  
10 another preset button on your home FM stereo.

11 A Again, you know, this -- it's a  
12 complicated -- or it's a complex answer. But when  
13 you're listening in your car, you know, in New York,  
14 there's maybe three rock stations. And when you're  
15 clicking between those stations, chances are if I  
16 don't like a song on one station, I'm going to click  
17 to something else, and I might hear an advertisement  
18 or a commercial. It's very -- it's very limited, you  
19 know.

20 If I'm listening to the top 100 greatest  
21 rock songs of all time on VH-1.com, and I decide I  
22 don't like a song and I just go, click, and I hear the

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1 next song, don't like that, click, I hear the next  
2 song, that's a very obviously different thing between  
3 changing between radio stations in a market.

4 In any given market you're going to have,  
5 you know -- again, it's repetition. It's very narrow  
6 availability of content. If you look at the VH-1  
7 website and they have the top 100 sold records, the  
8 top 100 rock records, really the best of the best, and  
9 you add skip functionality to it, that's a very  
10 different thing than hoping that when I switch from  
11 99.5 in New York when a DJ is talking about some  
12 nonsense, some patter, that I go to another station  
13 and hope that another great song is playing on that  
14 station.

15 Clicking through a list of the top 100  
16 greatest hits -- greatest songs, I don't know how you  
17 can draw the analogy, to be honest with you.

18 Q Let's put aside -- because I'm going to  
19 ask you specifically about this. You keep on focusing  
20 on the top 100 hits.

21 A Okay.

22 Q There are hundreds or thousands of genre-

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1 based radio stations out there that are not like that.

2 You would agree with me on that, right?

3 A Yes.

4 Q Okay. All of the Spinner stations, all of  
5 the Net Radio stations, before they met their demise,  
6 they're all genre-based stations that aren't top 100  
7 only, right?

8 A Yes.

9 Q Okay. Let's limit to that for a minute.

10 A Okay.

11 Q If you're dealing with genre-based  
12 stations and the only difference between the skip  
13 functionality is -- between the broadcast spectrum is  
14 not liking a song and changing a station or the  
15 preset, and not liking a song on the internet and  
16 skipping to the next song not knowing what it's going  
17 to be, are you aware of any specific data or  
18 information that would reflect that the skipping on  
19 the webcast service would be more displacing than  
20 skipping in the broadcast situation?

21 A I don't think -- I don't think you need  
22 data. It's common sense. You're sitting listening to

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1 the top -- to the -- to the '80s channel on Spinner.  
2 And as you're sitting there and you're going don't  
3 like Tina Turner, okay, Wang Chung, like that, don't  
4 like Wang Chung, I like Elton John, okay, click,  
5 click, click, and you're just going through stuff.

6 It's like it's -- when you add skip  
7 functionality it becomes very analogous to a jukebox  
8 or a library of content. It gets very close to that  
9 description of the celestial jukebox.

10 I can't make the connection at all between  
11 clicking between radio stations on my dashboard and  
12 then clicking within very narrowly-defined genres, and  
13 sorting through a wealth of content. They're two  
14 different mediums, and I think it's inappropriate to  
15 draw that kind of an analogy.

16 Q Lastly, on this MTV or VH-1 top 100, are  
17 you familiar with all the playlists and what the  
18 programming is or was on those stations?

19 A I wouldn't say I'm familiar with all, but  
20 I would say I'm probably more familiar than the man in  
21 the street.

22 Q Do you know whether they're still

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1 available?

2 A Not as of this morning. As of last week,  
3 they were.

4 Q Do you know whether those stations have  
5 exclusively 100 songs in the playlist or those are  
6 just emblematic of the content on those stations?

7 A I believe that it's emblematic of the  
8 content of those stations. I don't think it's just  
9 100 songs. I don't know. The content of this  
10 changes so much in relation to all the various legal  
11 goings on that could have changed this morning. I  
12 don't know.

13 MR. STEINTHAL: I have no further  
14 questions.

15 Tom?

16 MR. KIRBY: Yes, I do have some.

17 THE WITNESS: I'd like to run to the gents  
18 just for a moment.

19 CHAIRMAN VAN LOON: This is the time when  
20 we normally take our morning break anyway. So why  
21 don't we take until five minutes 'til.

22 THE WITNESS: Thank you.

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1 (Whereupon, the foregoing matter went off  
2 the record at 10:37 a.m. and went back on  
3 the record at 10:57 a.m.)

4 CHAIRMAN VAN LOON: Mr. McDermott, the  
5 whole panel would like to express its appreciation for  
6 your wisdom and foresight in reminding us that we  
7 needed that break.

8 ARBITRATOR VON KANN: According to  
9 Professor Jaffe, this will prove that none of us are  
10 cut out to be negotiated.

11 CHAIRMAN VAN LOON: This is Mr. Kirby who  
12 has a few questions for you.

13 CROSS-EXAMINATION

14 BY MR. KIRBY:

15 Q Mr. McDermott, when you opened that third  
16 bottle, I was impressed. I checked, and you only got  
17 half way through it, so you're not the man I thought.  
18 But nonetheless, it was an impressive show.

19 I'm representing Clear Channel, among  
20 others, and I do have a few questions.

21 You commented that webcasting provides a  
22 very different experience than terrestrial radio. Do

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1 you remember saying that?

2 A It can, yes.

3 Q That's what I wanted to get to. Now,  
4 there's a form of webcasting that I would call  
5 simulcasting, where a radio station simply streams its  
6 signal over the Internet. Are you familiar with that  
7 kind of webcasting?

8 A Yes.

9 Q That experience is actually very similar  
10 to terrestrial radio, isn't it?

11 A The programming, obviously, if it's a  
12 rebroadcast or a retransmission, is similar. I would  
13 say that the medium and the consumption experience is  
14 dissimilar.

15 Q Well, it's certainly dissimilar, but  
16 nonetheless, it's also similar. I mean, I don't want  
17 to quibble about this, but fair enough. The  
18 programming is similar.

19 Now, to the extent that you have one of  
20 these radio-directed promotional efforts going on, and  
21 that radio station is simply streaming its radio  
22 signal so that other listeners can get it at their

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1 workplace, for example, that's going to enhance your  
2 promotional effort, isn't it?

3 A Not necessarily, because it no longer  
4 becomes a regional thing, and it no longer  
5 becomes -- it's also no longer as narrow a medium  
6 because now the station has a global or -- well, a  
7 national or a global presence to it-- so the things  
8 that we find most appealing about the localization of  
9 terrestrial station and all the promotion that goes  
10 into it. If someone's listening in New York about  
11 in-store that's taking place at Tower Records in  
12 Seattle, that's nowhere near as promotional.

13 Q Okay. But let's break it down a little  
14 bit. You at least do have the song that you wanted  
15 over the Internet just like on the radio station,  
16 right?

17 A If you're talking about -- yes.

18 Q Do you know what percentage of listeners  
19 to these kind of streamed radio signals tend to be in  
20 the same geographic area that the radio station  
21 serves?

22 A I don't have specific information about

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1 that, but I know that from what I've heard from  
2 different web terrestrial rebroadcasters, part of  
3 their pitch over the years has been, now it's great  
4 because I have a national or global impact to  
5 promoting things.

6 Q But people in this business say all sorts  
7 of things without much basis, don't they?

8 A Yeah, but I think -- I don't know whether  
9 this is still a trend. It is show business at the end  
10 of the day.

11 Q That's fine. To the extent that listeners  
12 happen to be in the same geographic areas -- the  
13 station -- and are simply listening through their  
14 workstation as opposed to the transistor radio up on  
15 the bookshelf, then you're achieving very much the  
16 same things with respect to those listeners that you  
17 will be achieving through the person listening to the  
18 radio, right?

19 A If the percentage of it -- if there  
20 were -- if it was confined pretty much exclusively to  
21 the people in the local market, it would have  
22 similarities. But again, the medium I think is very

1 different.

2 Q The workplace computer just isn't as  
3 friendly as the bedside alarm?

4 A No. I just -- again, for the reasons I  
5 mentioned earlier about making analogy to a car radio,  
6 I think that there is a lot of new functionality and  
7 new revenue opportunities that are afforded webcasters  
8 and terrestrial rebroadcasters by the nature of the  
9 medium. So if you're asking me whether or not the  
10 content is exactly the same, and you're very narrowly  
11 asking that, then, yeah, I guess there are those  
12 benefits. But there are lots of other benefits as  
13 well. It's not a one for one comparison.

14 Q I understand. But the content would be  
15 the same, the timing would be the same, to the extent  
16 that the person is in the signal area of the station,  
17 the geographic location would be the same. And with  
18 those similarities, and as to those listeners where  
19 all three of those things are the same, you would  
20 expect pretty much the same promotional benefit to  
21 Sony, wouldn't you?

22 A No, I wouldn't expect the same promotional

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1 benefit.

2 Q Why would you expect a different  
3 promotional benefit?

4 A Because millions of people listen to that  
5 station in the physical world when they're on their  
6 way home or when they're at home, and there's a much  
7 small percentage of people that are actually listening  
8 on line. So I wouldn't characterize the medium as  
9 having the same promotional weight than it does in the  
10 physical world.

11 Q I understand.

12 A Again, it's a very limited amount of  
13 content, it's a limited amount of buttons on your  
14 radio; it's confined to that one region. You can't,  
15 to me, factor in all these other elements and all of  
16 this other ability to reach people outside of that  
17 market, and yet say it's exactly the same thing. I  
18 won't agree that it's exactly the same thing.

19 Q Well, let's try it this way. Per capita  
20 per listener minute, the promotional benefit to Sony  
21 of someone listening to a radio signal over the air  
22 and someone in the same geographical area listening to

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1 the same signal over their computer is going to be  
2 very similar, isn't it?

3 A There will be similarities. Yeah, I'll  
4 give you that.

5 Q Okay. Now, one of the sort of messages I  
6 take from your testimony is that both the music  
7 industry and the intersection of the music industry  
8 with the Internet are areas where things are changing  
9 dramatically; is that fair?

10 A Yes, that's correct.

11 Q And to a substantial extent,  
12 unpredictably; is that right?

13 A Yes.

14 Q For example, you believe the CDs are going  
15 away, but you don't know exactly when they're going  
16 away, do you?

17 A That's accurate, as in physical media; I  
18 wouldn't confine it to the compact disc. I would say  
19 physical media is going to I think decline over time  
20 and access from remote places -- unconnected  
21 access -- I think is going to increase. I think  
22 everybody thinks that in all media, not just the

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1 record business.

2 Q You said what that time line is, was three  
3 years, five years, seven years, longer-- we just don't  
4 really know for sure, do we?

5 A The signs are already there that it's  
6 starting up.

7 Q Well, we know the direction but we don't  
8 know the timing, right?

9 A Yeah.

10 Q Okay. And similarly, with respect to  
11 exactly what technology is going to replace the  
12 physical media, we don't know that yet either, do we?

13 A No, because as I mentioned previously when  
14 Ken was asking me questions, we don't necessarily  
15 focus on the technology; it's more the ease of  
16 distribution, the ease of consumption. Because  
17 technology is a thing that changes on a day-to-day  
18 basis.

19 Q I understand. And you mentioned that even  
20 when Sony has hired skilled analysts to do projections  
21 to help it figure out the future -- like Jupiter and  
22 Forrester -- sometimes what you get isn't real useful;

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1       isn't that right?

2               A       Correct.

3               ARBITRATOR VON KANN: Do you get a refund  
4       in that case?

5               THE WITNESS: Do you get a refund from  
6       your broker if your stocks go down?

7               ARBITRATOR VON KANN: Unfortunately not.

8               BY MR. KIRBY:

9               Q       And you don't know -- Sony doesn't  
10       know -- for example what electronic viruses bin Laden  
11       may have in store for us, does it?

12              A       No. If we did, I'm sure somebody from the  
13       FBI would have called me.

14              Q       My point is simply this; that if this  
15       group tries to set rates based on projections as to  
16       what's going to be happening in this industry two  
17       years or five years or seven years out, it's going to  
18       be telling a fairy story, isn't it?

19              A       No. I think that you kind of need to look  
20       at where the wind is blowing, look at what this media  
21       is about. And if you try to base -- all of the  
22       methods of distribution and consumption in this media

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1 are very different than they are to the analog world.  
2 And if you base the value of all this on the analog  
3 world, and say, well, today we think that this is all  
4 promotional and it's helping sell physical goods, so  
5 let's establish something based on that  
6 assumption -- when all the science points to the fact  
7 that that is starting to change, personally I would  
8 feel that that would be short-sighted.

9 Q But on the other hand --

10 A And I would also say that if -- by the  
11 very fact that webcasters and terrestrial stations are  
12 playing in this space, they clearly demonstrate that  
13 they believe that there is value in this new media and  
14 that the space is changing.

15 Q That wasn't my question. But my question  
16 was, to the extent they try to really make any  
17 five-year or seven-year projections as to what  
18 technology's going to be transmitting, at what bit  
19 rate, to what kind of receivers, over what percentage  
20 of the country, there's just no way to know that kind  
21 of stuff right now, is there?

22 A No, I think that there are absolutes in

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1 it.

2 (Whereupon, at 11:07 a.m., the proceedings  
3 went into Closed Session.)  
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22

1 BY MR. KIRBY:

2 Q Now, you talked about Sony focusing its  
3 promotional efforts on current music and on particular  
4 tracks from current albums; is that right?

5 A That's part of what we do.

6 Q And those are the tracks and those are the  
7 albums where Sony really hopes to make its money,  
8 right?

9 A Those are -- when we have new artists that  
10 are going to pop and sell millions and millions of  
11 records, it is not -- it's a rare thing when something  
12 that was released 20 years ago comes out of nowhere  
13 and sells 20 million records. That being said, we  
14 have a department called Legacy at Sony that spends a  
15 lot of time going through the catalog and putting out  
16 reissues from time to time, and occasionally building  
17 campaigns around things like Miles Davis' "Kind of  
18 Blue." We'll go back in. The engineers will get the  
19 original master tape, reengineer it, come out with a  
20 new marketing campaign about it.

21 So I certainly wouldn't say that our  
22 efforts are confined to newer products, but I will say

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1 the lion share of our marketing efforts are geared  
2 towards newer products.

3 Q That's where you expect to make most of  
4 your money; isn't that right?

5 A In times when, as I said, hits are  
6 unpredictable, a past hit is predictable because you  
7 know there's probably going to be an audience for it  
8 for an extended period of time. So catalog in times  
9 when a record company is cold keeps the lights on. So  
10 we make a tremendous amount of money, obviously, from  
11 catalog sales.

12 Q But you don't recruit bands and put out  
13 CDs and the expectation, well, we're not going to sell  
14 any in the 2000s, but come 2040, we'll have this in  
15 our catalog, and maybe some people will buy a few.  
16 That's not the way the record industry works, is it?

17 A We certainly hope that long-term artist  
18 development is an aspect of any artist that we break.  
19 You hope that -- our catalog -- the Bruce Springsteen  
20 catalog -- I heard some folks talk about Bruce  
21 Springsteen before. The Bruce Springsteen catalog  
22 continues to make us a tremendous amount of money, and

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1 it continues to make Bruce Springsteen a tremendous  
2 amount of money, 20-30 years later.

3 Q I understand, and I'm jealous. But the  
4 fact still remains, I think, that you have current  
5 music from which you expect to make far and away most  
6 of your money --

7 A Correct.

8 Q -- and then you have this back catalog  
9 stuff, and sometimes you get lucky. But I think it's  
10 right that you don't recruit bands and have them make  
11 CDs for the purpose of building up your back catalog,  
12 do you?

13 A Not in and of itself because that would be  
14 almost an impossible thing. You have to have the  
15 artist be successful, at which point after the product  
16 runs its life course, it goes into catalog, and then  
17 it's a viable product. You have to have one before  
18 you have the other.

19 Q And when you have the terrestrial radio  
20 station that is playing your current music, the music  
21 that you singled out to promote, Sony acknowledges it  
22 gets substantial promotional benefit from that, right?

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1 A For our physical goods, yes.

2 Q But at the same time that radio station is  
3 using your current high-value music, right?

4 A Correct.

5 Q Now, when somebody's playing out of your  
6 back catalog, Sony considers it gets far less  
7 promotional value from that, right?

8 A We don't really focus on the promotion in  
9 radio of that music, so, yeah, I would guess it would  
10 be accurate statement to say it's a less promotional  
11 value to it.

12 Q Okay. But at the same time it's less  
13 valuable music at that point too, right?

14 A I wouldn't say that "Sergeant Pepper" is  
15 less valuable than Britney Spears.

16 Q But there's always the exceptions. But  
17 how many Sergeant Peppers do you have in your back  
18 catalog?

19 A We have quite a few actually.

20 Q Really? Well, you're remarkably  
21 fortunate.

22 A Sony has a really good catalog.

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1           Q       Nonetheless, the fact of the matter is, if  
2       you contrast the value of music that a station focused  
3       on your current top hits is using compared to the  
4       value of a station that's playing swing music, for  
5       example, the station that's playing your current top  
6       hits is using much more valuable music, isn't it?

7           A       They're playing music that is a priority  
8       for us at that moment in time, and it is important for  
9       us for it to be a priority at that moment in time.

10          Q       And it's making a great deal more money at  
11       that --

12          A       Potentially, yes.

13          Q       Okay. And the swing music, for example,  
14       they're pulling out of your catalog and playing, if  
15       you make money, that's great, but you're not promoting  
16       that.

17          A       The important thing -- I know it sounds  
18       like I'm maybe being a little bit too detail, and I  
19       apologize for that. But the important thing to kind  
20       of understand about the catalog business in general is  
21       that it costs us a tremendous amount of money to get  
22       an artist off the ground and to make things

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1       successful, make videos that cost a million dollars.

2               Once we've already done that and the  
3       record has been successful, and then it goes into  
4       catalog, there's very little maintenance that's  
5       required in order for that to continue to sell. Miles  
6       Davis' "Kind of Blue" will sell long after we in this  
7       room are all gone. And it will do so with very little  
8       maintenance and attention from us. So we make a  
9       tremendous amount of money from catalog. It is an  
10      extremely important part of our business. And our  
11      investment in it relative to the pop stuff -- the pop  
12      stuff is a high investment is a high investment to  
13      make it happen; the catalog stuff, we don't have to  
14      put a tremendous amount of money into it, and yet it  
15      generates a significant amount of revenue for us.  
16      That's why I'm answering the way I am.

17              CHAIRMAN VAN LOON: Can I ask you related  
18      to this -- everything that we've been talking about is  
19      pop, and that's understandably a huge market. I  
20      happened Saturday after we adjourned to go a concert  
21      of Yo Yo Ma. And I noticed in the catalog that he was  
22      a Sony artist.

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1                   How much promotion is there for non-pop,  
2                   say the classical area, of somebody who sort of within  
3                   that area is a star?

4                   THE WITNESS: There is a tremendous amount  
5                   of promotion that gets done, and actually it's -- in  
6                   a lot of ways it's a lot harder work. Because we  
7                   would never take Yo Yo Ma necessarily to MTV.  
8                   Sometimes, let's say, if Yo Yo Ma did a set -- we've  
9                   had sound tracks like for Crouching Tiger. Sony  
10                  Classical did the sound track for that, and they did  
11                  a remix, and they tried to get it played. But for the  
12                  most part, MTV's not going to play Yo Yo Ma on TRL.

13                  So an alternative marketing element comes  
14                  into it where it becomes more lifestyle marketing. We  
15                  think about what is the lifestyle of people who listen  
16                  to Yo Yo Ma, and what places do they go to to get  
17                  turned on to music. And those are the places we focus  
18                  on. Obviously, that isn't mainstream radio or -- in  
19                  some cases it may be mainstream media. Like there  
20                  might be an article on Yo Yo Ma in "Time." But we do  
21                  a tremendous amount.

22                  CHAIRMAN VAN LOON: You then put an ad in

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1 "Time"?

2 THE WITNESS: We may have put an ad in  
3 "Time." The problem is that usually because somebody  
4 like Yo Yo Ma sounds a lot -- smaller amount of  
5 records than someone like a Brittny Spears, the  
6 marketing budget for that project is appropriate to  
7 what we expect the sales to end up being. So a  
8 full-page printout in something like "Rolling Stone"  
9 is going to cost 25 or \$50,000. And out of the  
10 marketing budget that you have to spend on an artist,  
11 that's a significant portion to spend on one ad, let's  
12 say.

13 So those kind of things. If a new Michael  
14 Jackson record is coming out, of course, you're going  
15 to do those kinds of things. For somebody like Yo Yo  
16 Ma, to spend that much money on one ad and one  
17 magazine that's on the shelves for a week probably  
18 wouldn't be good marketing. I would spend that money  
19 elsewhere for an artist like that, more lifestyle  
20 oriented marketing.

21 CHAIRMAN VAN LOON: Do you happen to know  
22 sort of ballpark what are likely sort of maximum sales

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1 in a year? Because we've gotten a lot of data from  
2 the top 100 album sales last year and things like  
3 that. Rough comparison, a relatively successful,  
4 classical artist, how many --

5 THE WITNESS: 20,000, 30,000. You  
6 occasionally have things -- anomalies -- where, let's  
7 say, if we do a -- one huge record for our industry  
8 was the Three Tenors' record a few years ago, had a  
9 PBS special behind it.

10 CHAIRMAN VAN LOON: Was that Sony?

11 THE WITNESS: No, actually I think that  
12 was London Records actually. A Sony analogy would be  
13 a young lady named Charlotte Church. She had a record  
14 out called Voice of an Angel, and she's a 12-year-old  
15 opera singer. She's been in Washington and sang for  
16 the president -- well, for President Clinton. And  
17 that kind of a thing becomes a social phenomena. And  
18 you can point to those kind of things as being the pop  
19 hits of the classical world. But for every one of  
20 those there are probably one or 200 classical CDs that  
21 we might put out that have very small unit sales. As  
22 a matter of fact, the typical classical CD might sell

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1 5,000 units.

2 CHAIRMAN VAN LOON: Do you happen to know  
3 how many the Three Tenors sold?

4 THE WITNESS: Millions of records.

5 CHAIRMAN VAN LOON: They sold millions.

6 THE WITNESS: Millions.

7 CHAIRMAN VAN LOON: I see. And how about  
8 Church?

9 THE WITNESS: I'm not sure whether  
10 Charlotte went platinum, but I'm pretty sure she at  
11 least went gold in the United States. I think there  
12 might have been a platinum record.

13 CHAIRMAN VAN LOON: Gold is how many?

14 THE WITNESS: Five hundred thousand units,  
15 sir. But she appeared on "Oprah." We record Chinese  
16 symphonies, recording traditional Chinese repertoire,  
17 and it's rare that those guys get on "Oprah" or get to  
18 play for the president, or get a PBS special.

19 ARBITRATOR VON KANN: Why wouldn't the  
20 Internet, with all these genres where you have  
21 specialized audiences collected, be a terrific  
22 opportunity for selling some modest additional

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1 amount -- Yo Yo Ma's not going to sell 6 million, but  
2 instead of 20,000, if he could sell 30 or 40, wouldn't  
3 that be nice? Or the jazz channels, where everybody,  
4 oh, they've redone the Miles Davis thing.

5 Why wouldn't those be ideal places for  
6 targeted promotion of these kinds of less -- not the  
7 pop top hit records, but you still got them, and it  
8 would be nice to increase their sales by 50 percent or  
9 25 percent or 10 percent, I guess. There's some cheap  
10 advertising on these Web sites.

11 THE WITNESS: We'll get it all the time.  
12 You'll see it in the testimony. We try to get it all  
13 the time.

14 I think the key word in what you just said  
15 is "targeted." It is a viable place. I've spent the  
16 past eight years of my life trying to figure out ways  
17 to market on the Internet, but it has to be targeted.  
18 And when we're -- it's part of an overall approach to  
19 marketing an artist. The Internet in and of itself  
20 right now, we wouldn't solely place all our bets on  
21 doing a promotion just exclusively on the Internet,  
22 but Internet, particularly for those kinds of artists,

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1 are a really important part of the marketing of those  
2 artists; but again, very targeted marketing.

3 BY MR. KIRBY:

4 Q Do you know the song -- it's a very dated  
5 song at this point; it was long before you were in  
6 junior high school -- "Shine Little Glow Worm, Glimmer  
7 Glimmer"?

8 A I think I might have sang it when I was at  
9 camp when I was younger.

10 Q Okay. My daughter, who's in college right  
11 now, recently sought out and purchased the CD that has  
12 that song on it.

13 CHAIRMAN VAN LOON: It's by the Mills  
14 Brothers.

15 MR. KIRBY: It's actually a number of  
16 them.

17 Would you care to guess what triggered her  
18 doing that?

19 THE WITNESS: I would -- for a betting  
20 man, I'd say you were going to tell me Internet radio.

21 MR. KIRBY: This is a very wise man. She  
22 heard it. And if you don't hear music, you're not

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1 very likely to buy it, are you?

2 THE WITNESS: I'd say that's a safe  
3 assumption.

4 BY MR. KIRBY:

5 Q Okay. So with all this catalog of music  
6 that Sony and the other record companies have out  
7 there, putting aside the current stuff that you're  
8 promoting, putting aside the compilations that your  
9 Heritage division puts together from time to time, if  
10 people are going to be buying from that  
11 catalog -- particular, younger people that are coming  
12 up, who weren't around when the Mills Brothers were  
13 singing "Shine Little Glow Worm" early on, if those  
14 catalogs are going to have sales, it's going to be  
15 because somebody out there is playing that music so  
16 that new listeners are hearing that music; isn't that  
17 right?

18 A That's probably a pretty safe assumption.

19 MR. KIRBY: That's all I have.

20 CHAIRMAN VAN LOON: Now, your counsel gets  
21 a chance to ask you additional questions, if they  
22 would like to.

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1 MR. NEWBERG: We'd actually like to take,  
2 if we could, a 10-minute break credited against our  
3 time, obviously, before we go into redirect.

4 CHAIRMAN VAN LOON: Okay. Before we do  
5 that, just to report, I'm assuming we have not had any  
6 luck reaching Wolfgang Spegg.

7 MR. GARRETT: I think that is correct,  
8 Your Honor. Sorry.

9 CHAIRMAN VAN LOON: No problem.

10 MR. GARRETT: I should say that there was  
11 a message that was left for him, and to the best of my  
12 knowledge, he's not returned it.

13 CHAIRMAN VAN LOON: We still have a very  
14 easily budgeted time, afternoon, so it shouldn't be a  
15 difficulty.

16 Okay. A 10-minute break credited against  
17 Mr. Harding.

18 (Whereupon, the foregoing matter went off  
19 the record at 11:24 a.m. and went back on  
20 the record at 11:46 a.m.)

21 CHAIRMAN VAN LOON: After deliberation,  
22 have you all decided that you do have some --

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1 MR. NEWBERG: We have just a few  
2 questions.

3 REDIRECT EXAMINATION

4 BY MR. NEWBERG:

5 Q Mr. McDermott, you said Sony started  
6 selling downloads in April 2000. Were you already  
7 doing one-off agreements for downloads and on-demand  
8 streaming at that time?

9 A Yes. I started -- when I began at Sony,  
10 we did a gigantic Mariah Carey promotion, streaming  
11 her new single with Microsoft in August of 1999. And  
12 I've done stuff all through my career prior to being  
13 at Sony as well.

14 Q And you've done those agreements with  
15 companies like the companies with whom you submitted  
16 agreements as exhibits, like MTV and Launch?

17 A Yes.

18 ARBITRATOR VON KANN: Are you responsible  
19 for the fact that this month's "Architecture Digest"  
20 has a big spread on Mariah Carey's new house?

21 THE WITNESS: No, sir. I cannot claim to  
22 be responsible for that.

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1 MR. STEINTHAL: Maybe indirectly.

2 THE WITNESS: She's actually on Virgin  
3 Records now; so she's no longer a Sony artist.

4 BY MR. NEWBERG:

5 Q You also talked earlier about servicing.  
6 Does all servicing mean giving free records?

7 A No. We actually have a wholesale price.  
8 I don't know exactly how it works, but I know that  
9 where there have been requests for servicing there's  
10 a blue-sheet rate or something that we'll refer folks  
11 to the distribution people to actually buy records.

12 Q And they buy them at a discounted price?

13 A They buy them at a discounted price  
14 relative to retail, yeah. They have that ability.

15 Q And that's also considered servicing.

16 A Yes.

17 Q You were asked earlier by Mr. Steinthal if  
18 you had any data that webcasters functions are not  
19 promotional. I assume in your experience you've  
20 personally heard webcasters tell you that their  
21 functions are promotional.

22 A Yes.

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1 Q Has any webcaster ever presented you with  
2 any data proving that these functions are promotional?

3 A No.

4 Q You also talked earlier about the future  
5 of the industry and sales on the Internet, and your  
6 views on that. Were you limiting your views to  
7 downloads only when you talked about the future of  
8 sales of music on the Internet?

9 A I'm sorry. Could you repeat the question?

10 Q When you talked about the future of sales  
11 on the Internet, were you limiting your answer to  
12 downloads?

13 A Oh absolutely not. I think downloads is  
14 kind of the dumbest type of a product that we could  
15 sell over the Web. I think it's more about access,  
16 it's more about the ease of distribution, portability.  
17 So a download is analogous almost to a physical good,  
18 it's transfer of ownership. That certainly will be in  
19 our suite of products that we would offer at some  
20 point, but I think increased access, conditional  
21 access-- all of those type of models are a lot more  
22 exciting than a one-for-one purchase experience.

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1 Q And how does DMCA webcasting fit into your  
2 view of the Sony revenue stream?

3 A Well, I think that it's a -- it can be  
4 very -- it can be very compelling to a user to have  
5 very niche-oriented programming in particular.

6 I'm sorry. Could you repeat the question?

7 Q Sure. How do you view DCMA webcasting as  
8 part of Sony's revenue stream?

9 A Well, it's -- the answer that I had just  
10 given about the fact that we have new types of  
11 distribution, new consumption models, as we move away  
12 from the physical good. It's a pleasing experience  
13 for a listener to be able to go on and listen to all  
14 sorts of different types of channels in an aggregated  
15 location, and listen to vary narrow niches. And that  
16 could be traditional pop kind of radio or it could be  
17 the banjo music channel.

18 But being able to have this wealth of  
19 content sitting there that is on all the time and  
20 isn't as narrow as traditional radio is something that  
21 we think is going to be very appealing to consumers.  
22 And as a result, there's a chance to monetize that.

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1 Q And does Sony view this monetizing of DMCA  
2 webcasting as just an ancillary part of its revenue  
3 stream?

4 A No. I would say that, generally, access  
5 to music, the distribution of music digitally and the  
6 various consumption models are what our business is  
7 going to be about. As I mentioned earlier about the  
8 physical goods starting to go away, physical good has  
9 a lot of limitations to it. If you've got a 500-CD  
10 collection, and you want to go out to your car, cars  
11 have six CD changers, when you're able to, actually,  
12 to just listen to this wealth of stuff, it becomes  
13 very compelling. The change of the physical good, of  
14 the portability, of the accessibility start to vanish.  
15 And I think that that will be very appealing to  
16 consumers, and as a result, the physical good will  
17 take a hit.

18 Q And have you already started seeing some  
19 of that?

20 A I think so. I think the fact  
21 that -- certainly, a tremendous amount of people  
22 used -- an unbelievable amount of people use Napster.

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1 I think that our sales this year have been flat. And  
2 as I mentioned earlier, the markets particularly  
3 outside the United States have seen a tremendous  
4 decrease in sales, and they think it's tied into CD  
5 burning and general online consumption of music. So  
6 it's starting. It's an opportunity. If you looked at  
7 it just as a threat, that would be inappropriate.  
8 There's an opportunity there, clearly.

9 Q You talked about data before, showing what  
10 webcasters sold in clickthroughs. Do you actually get  
11 routine reports from Amazon telling you how many  
12 clickthroughs came from webcasters?

13 A No. They'll speak anecdotally sometimes  
14 when they're making pitches about how successful  
15 various promotions are, but in terms of providing  
16 detailed reports about those kinds of things, the  
17 nature of their agreements with the people that have  
18 those relationships with them would preclude them from  
19 providing me with that information, unless the  
20 webcaster consented to that information being  
21 provided.

22 Q And have individual webcasters ever given

1 you this information?

2 A No, because I don't think -- I think they  
3 realize it wouldn't be particularly thrilling.

4 Q

5 MR. KIRBY: If it was worth it, I would  
6 object to that speculation.

7 MR. NEWBERG: I think that's all we have.

8 CHAIRMAN VAN LOON: Anything on recross?

9 MR. STEINTHAL: I have a couple of  
10 questions generated from that discussion.

11 RECROSS-EXAMINATION

12 BY MR. STEINTHAL:

13 Q First of all, I take it the Pearl Jam  
14 promotion in which there were only --

15 MR. STEINTHAL: I don't think I'm going to  
16 go anywhere near where we need to go on restricted.  
17 You gave a number of units, if you will, that were  
18 sold as a result of the Pearl Jam promotion. You  
19 don't have to repeat what that number is. It would be  
20 a fair statement, wouldn't it, that in all the  
21 promotions, including the Mariah Carey promotion that  
22 you've done on the Internet, there have been many that

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1 have resulted in clickthrough sales of a lot greater  
2 than the Pearl Jam promotion that you referenced.

3 THE WITNESS: No. Clickthrough sales as  
4 a general statement are the last thing that I want to  
5 look at as being the real value behind any of these  
6 promotions because they're always the typically meager  
7 sales.

8 BY MR. STEINTHAL:

9 Q But you're not going to sit here and  
10 testify that the Pearl Jam number is a number that  
11 hasn't been exceeded.

12 A No, it's been exceeded in different cases.  
13 But I would say that, generally, in terms of the kind  
14 of numbers that I would expect to get a record label  
15 excited about, these kind of numbers have fallen far  
16 short of that. And, again, I've asked every webcaster  
17 that I've ever met with in any meeting to provide me  
18 with a single example, anecdotal example, of an  
19 aggressive, successful clickthrough, or sales as a  
20 result of a promotion via these links. And I must  
21 have asked the question 50 or 60 times over the past  
22 few years, and I've never had a single occasion where

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1 I was given a concrete example of a successful sale as  
2 a result of clickthroughs.

3 ARBITRATOR VON KANN: But you keep doing  
4 it.

5 THE WITNESS: It doesn't hurt. That's the  
6 great thing about it. All you've got to do is put a  
7 link there. It's really -- it's -- it doesn't hurt.

8 BY MR. STEINTHAL:

9 Q And the value of the promotion is often  
10 much more that whatever the limited clickthrough might  
11 be because it sends people to the artist site, it  
12 sends people to Sony's site, it interests people in  
13 the music, the new music being offered; isn't that  
14 right?

15 A That's correct, but the process by which  
16 we get all that is a negotiation, and we have to sit  
17 down and say what we want. And as you can see, each  
18 of these end up turning into an agreement in order for  
19 us to get that value, to extract that value. As a  
20 general rule of thumb, when things get played on  
21 Spinner, I don't get all of those things for every one  
22 of my records that get played on a station like

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1 Spinner.

2 Q Now, you talked about these targeted  
3 promotions, and you talked about the fact that they  
4 are targeted. And that was, I believe, in response to  
5 either counsel's or one of the panel's questions. You  
6 made a big point of the promotions being targeted.

7 Let me ask you this. I take it that when,  
8 for example, the targeted promotion is an MTV  
9 promotion, it's often of an artist whose very works  
10 are being played on the webcasting service that MTV  
11 has, right?

12 A Yes. And as a matter of fact, what we try  
13 to do is leverage the online visibility with offline  
14 visibility. And we will ask for in-kind bartering.  
15 If we give a stream to MTV, typically we ask them to  
16 run advertisements or crawls along the bottom of the  
17 screen which actually announce that. And we can very  
18 accurately look at what the monetization of that might  
19 be. If we wanted to buy 30-second spots on MTV to run  
20 nationally, we have a rate. We know very clearly what  
21 the value of that is, and we fight very hard to get  
22 significant border on air for things we do on the Web

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1 site.

2 Q And it is true as well, is it not, that,  
3 typically, MTVi or Spinner, for example, to the extent  
4 they're doing a promotion with you, are going to be  
5 doing promotions of artists whose works are included  
6 on their webcast radio stations as well, right?

7 A Sometimes, but if you look at stuff like  
8 the top 100 greatest soul hits, whatever, it's not  
9 very reflective of what the repertoire they're  
10 currently playing on VH-1 would be.

11 Q Of course, because that particular station  
12 is a catalog station; it's not a new artist station.  
13 But when they do a promotion for Ricky Martin --

14 A MTV would be a pure example of what you're  
15 trying to say, yes.

16 Q Now you mentioned the n-word, so I have to  
17 come back to it, that being the Napster word, in  
18 response to counsel's questions. You are familiar  
19 with the fact that Napster, of course, delivered to  
20 people using it CD-quality possession of files of  
21 music that they could put into portable players and  
22 the like, right?

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1           A       I would agree with everything except for  
2 your comment that it is CD quality. CD quality is  
3 1644 redbook audio. A 128K compressed MP3 file is not  
4 CD quality.

5           Q       But people using Napster get the 128K as  
6 opposed to the 16 or 32 kilobit stream, right?

7           A       Correct.

8           Q       And you would agree with me that the  
9 experience in terms of potential displacement of  
10 having physical possession of the music file at  
11 128 kilobits is very different than the streaming  
12 experience.

13          A       Yes.

14                   MR. STEINTHAL: I've nothing else.

15                   MR. KIRBY: Very briefly.

16                   REXCROSS-EXAMINATION

17                   BY MR. KIRBY:

18          Q       You mentioned the blue sheet. And if I  
19 understood what you said, if I'm a webcaster, and I  
20 call up and ask to get service, Sony's likely to tell  
21 me know, we won't give you CDs, but call over here and  
22 take a look at our blue-sheet prices; is that what you

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1 said?

2 A If we felt like someone was an appropriate  
3 promotional partner, then, yes, there's an ability to  
4 buy product from us at a reduce price point than going  
5 into retail. But as I mentioned also, I don't  
6 personally handle those transactions, so I can only  
7 speak in very vague terms about how that works.

8 Q Since it's come up, do you know? Is there  
9 actually a blue sheet or at least a sheet regardless  
10 of what the color is these days?

11 A I think that's the moniker that is used  
12 for servicing of people who want to buy product from  
13 us.

14 Q Does it refer to the fact that there are  
15 prices available? When this happens, they don't sit  
16 down and negotiate one by one by one the price of  
17 these sheets?

18 A No. It's a reduced as a wholesale price.  
19 And, actually, it is geared towards instead of someone  
20 having to go out and spend 15 or 16.98 on every CD  
21 they want to buy, there's a reduce price at which they  
22 can buy CDs. And that's an incentive, obviously, for

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1       them to purchase from us.

2               Q       Right. Is it your impression that at  
3       least some webcasters are able to get CDs at the  
4       blue-sheet price?

5               A       If they asked to -- if they wanted to buy  
6       them from us, yeah, that is my impression. I guess  
7       the question is whether or not -- it seems like some  
8       folks that we've met with wanted to just get  
9       everything for free. And if you say, well, you can  
10      get a greatly reduced price versus retail, some might  
11      find that a compelling option and some might think,  
12      no, I should just get it for free.

13              Q       Right. Oh, I understand that there are  
14      people in this industry who would like to get things  
15      for free. But still, if I understood what you said,  
16      you believe webcasters, if I was going to do an  
17      Internet streaming program, and I came to Sony, and  
18      Sony concluded it didn't just want to give me the CDs,  
19      Sony might very well refer me to the blue-sheet  
20      prices; is that right?

21              A       Yeah.

22              Q       Or the prices would be greatly reduced; is

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1 that right?

2 A Yes.

3 Q And that's because of the promotional  
4 value of what I would be doing, right?

5 A It's because -- it's basically because, if  
6 someone's starting a business where they're going to  
7 be playing our records, and we come up with a  
8 licensing agreement with them, and we want to make it  
9 easier for them to get into this space and actually  
10 build a business, they need our music to do so. So  
11 what we're doing is giving them -- making it easier  
12 for them to do that.

13 Whether or not -- we could certainly just  
14 say, we'll go buy them at a store, but I think that  
15 what we're doing is making it easier for somebody who  
16 wants to get into a new business. We're lowering the  
17 cost of entry. I don't think there's any real  
18 ulterior motive to it or recognition under some other  
19 fact.

20 MR. KIRBY: That's all I have.

21 MR. NEWBERG: I just have one question.

22 REDIRECT EXAMINATION

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1 BY MR. NEWBERG:

2 Q Mr. McDermott, was I correct, just that I  
3 heard you correctly? The only time a webcaster would  
4 get blue-sheet prices is if you already decided that  
5 they would be an adequate promotional partner for you  
6 on other things?

7 A Yes.

8 MR. NEWBERG: That's all I have.

9 CHAIRMAN VAN LOON: Thank you all.

10 Thank you very much for making the trip  
11 down and for lasting through all this water and the  
12 rest. This is I guess Poland Springs water torture.

13 We'll stand adjourned 'til 1:30 then.

14 (Whereupon, the foregoing matter went off  
15 the record from 12:03 p.m. until 1:34 a.m.)

16 CHAIRMAN VAN LOON: Welcome. We're  
17 delighted to have you here. Please take a seat.  
18 Thanks, in part, to you, and thanks, in part, to our  
19 witnesses this morning. I think this is week nine of  
20 our hearings. This is the first day we've ever gotten  
21 more than an hour for lunch, so this is a day to  
22 celebrate.

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1                   We very much appreciate your coming and  
2 willing to be with us today to answer some of the  
3 panel's questions about the agreement that you entered  
4 into. Let me ask you to raise your right hand to be  
5 sworn in, please, by our court reporter.

6 Whereupon,

7                   WOLFGANG SPEGG

8 was called as a witness, and, having first been duly  
9 sworn, was examined and testified as follows:

10                  CHAIRMAN VAN LOON: For the public record,  
11 could you state and spell your name, pleas?

12                  THE WITNESS: My name is Wolfgang Spegg.  
13 First name is W-o-l-f-g-a-n-g, and last name is  
14 S-p-e-g-g.

15                  CHAIRMAN VAN LOON: Great. And could you  
16 give us the name of your company and your position in  
17 it?

18                  THE WITNESS: I'm president and CEO of  
19 Musicmusicmusic, Inc.

20                  CHAIRMAN VAN LOON: Excellent. As we said  
21 in our letter of invitation to you, we have received  
22 a good deal of information about how Musicmusicmusic

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1 works, and there were a group of questions which we as  
2 a panel wanted to ask you. And then in addition,  
3 there will be an opportunity for the lawyers from each  
4 side in this proceeding to ask you their questions as  
5 well.

6 THE WITNESS: I'll be happy to answer  
7 anything asked.

8 CHAIRMAN VAN LOON: Judge Gulin, would you  
9 pose some questions for us, please?

10 ARBITRATOR GULIN: Sure.

11 Hello again, Mr. Spegg. And as the chair  
12 indicated, I'll be asking a few general questions, and  
13 then the attorneys will probably want to get into some  
14 more specifics.

15 Let me start by asking you, when did your  
16 service launch?

17 THE WITNESS: We launched on Christmas  
18 Day, December 25, 1997.

19 ARBITRATOR GULIN: And I take it you're  
20 still operating?

21 THE WITNESS: Yes, we're still operating,  
22 one of the few, I guess.

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1 ARBITRATOR GULIN: Now, you first entered  
2 into an agreement with the RIAA. I believe that was  
3 I guess a couple years into your operation. Was it  
4 April of '99 when you entered into an agreement with  
5 them?

6 THE WITNESS: You know, I don't know the  
7 exact date, but it was in the spring of '99. We had  
8 actually applied for the license long before that,  
9 before the DMCA got passed.

10 ARBITRATOR GULIN: When you say you  
11 applied for the license, you mean you had sent notice  
12 into --

13 THE WITNESS: We approached the RIAA, and  
14 we asked them to license what we were doing.

15 ARBITRATOR GULIN: Okay. And you entered  
16 into an agreement with the RIAA, and that agreement  
17 ran for a period of time, and then that initial  
18 agreement expired, correct?

19 THE WITNESS: That's correct, yes.

20 ARBITRATOR GULIN: And so you entered into  
21 I guess negotiations to renew the agreement.

22 THE WITNESS: Yes. And we renewed that

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1 late last year.

2 ARBITRATOR GULIN: And that agreement that  
3 you're operating under now, if my information is  
4 correct, runs from the period of March of '01 through  
5 the end of next year, the end of '02.

6 THE WITNESS: That is correct, I believe,  
7 yes.

8 ARBITRATOR GULIN: Now, when you first  
9 entered into the agreement with RIAA, again, if my  
10 understanding is correct, you offered a functionality  
11 that was known as I'm the DJ.

12 THE WITNESS: That is one of the many  
13 functionalities that our Web site offers.

14 ARBITRATOR GULIN: It still offers that,  
15 I'm the DJ?

16 THE WITNESS: Yes, it does. But let me  
17 explain that we operate -- we abide by the DMCA under  
18 those recordings that we license through the RIAA, and  
19 we offer some very interactive services with tracks  
20 that we license directly through some of the record  
21 companies, many of the independents. And now we are  
22 starting to get licensed by the majors as well for

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1 interactivity.

2 ARBITRATOR GULIN: With respect to the  
3 license agreement with RIAA that was for  
4 DMCA-compliant services, is it true that the RIAA had  
5 some concerns concerning this functionality known as  
6 I'm the DJ?

7 THE WITNESS: We went through a long  
8 period of negotiation with the RIAA, and we had a  
9 number of our services that needed to be restricted or  
10 altered. And when -- a matter of fact, we started  
11 working on coding on software the same month that the  
12 DMCA got passed, which was October 1998, to make sure  
13 that our software -- made sure that each stream abided  
14 with the DMCA rules.

15 It is a little bit difficult to tell from  
16 our site exactly what we do because any one user can  
17 have a mix of tunes that must abide by the DMCA and  
18 tunes that do not have to abide by the DMCA. We  
19 control our database by having a software switch on  
20 each track. It is a DMCA track or a non-DMCA track.  
21 So, therefore, when a user decides to create their own  
22 show like in the I am the DJ service, they can only

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1 choose from the non-DMCA tracks, which includes over  
2 100 independent labels.

3 So to really know what's going on, you  
4 must really know every single track and who it belongs  
5 to-- is it controlled by one of the majors or is it  
6 controlled by one of the independent labels that  
7 signed on an interactive agreement with us.

8 ARBITRATOR GULIN: So is it fair to say,  
9 then, that the I'm the DJ functionality is not now  
10 part of the DMCA-compliant --

11 THE WITNESS: That is correct.

12 ARBITRATOR GULIN: -- agreement you have  
13 with the RIAA?

14 THE WITNESS: Yeah.

15 ARBITRATOR GULIN: Now, at the time that  
16 you entered into the agreement, and you were operating  
17 already, did you have a song skip function?

18 THE WITNESS: At the time that we entered  
19 it, we already had taken -- sorry. The skip function  
20 is still there; however, the backwards skip function  
21 is not there. And that was the request made by Steven  
22 Marks of the RIAA, that we cannot allow them to go

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1 backwards and replay the same song, but we can skip it  
2 and go on to the next song.

3 ARBITRATOR GULIN: As far as the forward  
4 skipping function, you had that at the time you  
5 entered into the agreement, and you continue to have  
6 that as part of your DMCA-compliant --

7 THE WITNESS: That is correct, yes.

8 ARBITRATOR GULIN: Are there any  
9 limitations on that skip function with respect from  
10 the users perspective? If I'm a listener to your  
11 service and I want to use that skip function, are  
12 there any limitations as to how often I can use it, or  
13 how many times I can push the button, or anything  
14 along those lines?

15 THE WITNESS: No, but maybe again I should  
16 explain a little bit. We do -- we stream differently  
17 than 99.9 percent of the services out there, and that  
18 we unicast. So when a user first decides to play a  
19 particular show -- let's call it a show; some of the  
20 services call it channels, but we're not like  
21 them -- at the time that he clicks that mouse on that  
22 show, our system creates a unique and randomized

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1 playlist from a much larger basket of tracks that will  
2 run for up to 50 songs long. Should the user stop  
3 that show and start it again, a completely different  
4 and, again, unique and randomized list of songs is  
5 created for that playlist. The user can skip, and can  
6 skip a song anytime that they wish to.

7 ARBITRATOR GULIN: When the user presses  
8 the skip button, though, that doesn't create an  
9 entirely new 50-song list?

10 THE WITNESS: No. When that list is  
11 created -- and let's say it's a list of 50  
12 tracks -- it will go from Track 1 through 50. The  
13 user does not know which track is coming next. That  
14 is strictly for internal control. Each song is a URL,  
15 so our software points to where that URL is.  
16 Sometimes when that URL is corrupt that it doesn't  
17 exist, the system will skip it all by itself. But the  
18 user can skip once a song has started, and it will go  
19 on to the next song.

20 ARBITRATOR GULIN: Okay. Under the DMCA,  
21 as I understand it, you're not permitted to have more  
22 than two consecutive songs from the same album to the

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1 listener.

2 THE WITNESS: The way I understand it is  
3 you're not allowed to have more than two songs of a  
4 particular artist in a row. You're not allowed to  
5 have more than three songs off a particular album or  
6 off a particular artist in a show. And there are many  
7 other rules and regulations that are in there. And  
8 you know, I did not do the programming; our  
9 programming team did that. And we have written the  
10 software so that to test against each and every one of  
11 these rules and regulations, and make sure that that  
12 particular stream abides by it.

13 ARBITRATOR GULIN: And you may not be able  
14 to really answer more fully than that. But if, for  
15 example, there were three songs, is it possible that  
16 there could be three songs from a particular album in  
17 one playlist?

18 THE WITNESS: It is possible. It is very  
19 highly unlikely because of the randomization feature,  
20 but it is possible. Our relational database is built  
21 such a way that every track is related to an album or  
22 more than one album, because when you have a "best of"

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1 album, of course it's related to more than one album.  
2 And it tests every single one of these occurrences and  
3 makes sure there's not more than three of one album.

4 ARBITRATOR GULIN: So it's possible but  
5 highly unlikely. Let's for a moment assume that it  
6 does happen, that there are three tracks from a given  
7 album within the playlist. And as a user, I use my  
8 skip function so that, to me, I get to hear three  
9 consecutive tracks on the same album by using the skip  
10 function. They weren't programmed that way, but I had  
11 to use my skip function to do that.

12 Under those circumstances, I take it you  
13 feel that the services still comply.

14 THE WITNESS: Well, I think it is  
15 impossible for you to do that because you would have  
16 to listen to the beginning of the next song to find  
17 out whether it is from the same artist or the same  
18 album. So you will at least get a snippet of other  
19 songs in between.

20 ARBITRATOR GULIN: Okay. That's correct.  
21 And would it be that fact that you would rely upon to  
22 say that there weren't really three consecutive

1 tracks?

2 THE WITNESS: Yes, I would, yeah.

3 ARBITRATOR GULIN: So just for the  
4 record -- I'm sure I know the answer -- you feel your  
5 skip function is DMCA-compliant?

6 THE WITNESS: Well, we feel it does. And  
7 let me also say that we -- it is our intention to push  
8 the envelope on each and every one of these rules and  
9 regulations of the DMCA but to totally abide by them.  
10 The reason why we want to push the envelope is because  
11 we want to make the experience as enjoyable to the  
12 listener as possible.

13 ARBITRATOR GULIN: At this time,  
14 Mr. Chair, I think we need to go into restricted  
15 session.

16 CHAIRMAN VAN LOON: Okay. Please mark  
17 that on the record.

18 This is a procedure which we use very  
19 regularly in order to ask questions about business  
20 elements or things that are not part of the public  
21 information. And only people who are appropriate,  
22 have access to restricted material, can be present and

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1 listen. And in the transcripts that are filed  
2 publicly and available to the public through the  
3 Library of Congress, the part that we're now going to  
4 do will not be made available to the public. So it's  
5 to protect your business interest while at the same  
6 time giving us as much information as we can to be  
7 able to make a reasonable decision.

8 (Whereupon, at 1:48 p.m., the proceedings  
9 went into Closed Session.)  
10  
11  
12  
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22

1 ARBITRATOR VAN LOON: This is open  
2 session, I hope. Yes, open. Mr. Katz?

3 MR. KATZ: I was saying that I was alerted  
4 during the break to a protective order issue relating  
5 to this Witness. The Panel may remember during Mr.  
6 Marks' examination that he indicated that long after  
7 the streaming audio service, about which the Witness  
8 is going to testify, discontinued. Mr. Purcell was  
9 signed on by the RIAA as a consultant.

10 In that role as a consultant, he did  
11 execute the protective order in this case, and certain  
12 confidential materials were disclosed to him,  
13 confidential materials which have nothing to do with  
14 his testimony today. At that point, he did execute  
15 the exhibit to the protective order, but under the  
16 terms of the protective order we were not required to  
17 serve that on opposing counsel until it became clear  
18 that he was going to be a witness.

19 Well, it really didn't occur to us that he  
20 was, as a consultant, going to be appearing as a  
21 witness, because the Panel invited all licensees to  
22 appear. But a technical instruction could indicate

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1 that that was required, so we are getting copies of  
2 the certification and will provide it to opposing  
3 counsel. I don't think that this would be a violation  
4 of the protective order, but I apologize for our delay  
5 in providing those.

6 MR. STEINTHAL: Can we understand what  
7 confidential information the Witness has reviewed?

8 MR. SIGALL: He was provided with the cost  
9 information that the webcaster witnesses provided in  
10 their written testimony in the direct case.

11 ARBITRATOR VAN LOON: From the direct  
12 case.

13 ARBITRATOR VON KANN: I think that I  
14 remember --

15 MR. STEINTHAL: Well, we knew he had been  
16 designated --

17 ARBITRATOR VON KANN: -- Dr. Nagle  
18 testifying, as a matter of fact, to Mr. Purcell's  
19 review of some of that stuff and some of the  
20 consultations that he had with him, I believe.

21 MR. STEINTHAL: I think he disclosed that  
22 he had had conversations with him about the business.

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1 I didn't know that he had reviewed specific financial  
2 information from our client.

3 MR. SIGALL: I think Mr. Marks testified  
4 to that, in fact, as to what his role --

5 ARBITRATOR VAN LOON: That's my memory as  
6 well.

7 ARBITRATOR VON KANN: Okay.

8 ARBITRATOR VAN LOON: So I think we have  
9 a situation where we're probably in line with the  
10 spirit and not necessarily the timeliness of the  
11 letter, but nonetheless in a position where we're  
12 appropriate to proceed.

13 MR. KATZ: Thank you.

14 ARBITRATOR VAN LOON: Mr. Purcell, first,  
15 let us thank you for coming, for making this trip and  
16 with apologies that we're running behind in our  
17 schedule today, and we appreciate your forbearance.  
18 We're going to do everything we can to be as focused  
19 and crisp in our questions so as not to run you any  
20 further later than necessary. We appreciate you  
21 coming. I need to ask you to raise your right hand to  
22 be sworn in by the court reporter.

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1 WHEREUPON,

2 SCOTT PURCELL

3 was called as a witness by the CARP Panel, having  
4 first been duly sworn, assumed the witness stand, was  
5 examined and testified as follows:

6 ARBITRATOR VAN LOON: And for the record,  
7 would you please say and spell your name?

8 THE WITNESS: Scott Purcell, S-C-O-T-T P-  
9 U-R-C-E-L-L.

10 ARBITRATOR VAN LOON: And your position  
11 and the name of the company about which you're going  
12 to testify with the agreement.

13 THE WITNESS: With the agreement. I was  
14 the Founder and CEO of OnAir Streaming Networks,  
15 Incorporated.

16 ARBITRATOR VAN LOON: And my colleague,  
17 Judge Gulin, has a few questions to ask on behalf of  
18 us as a Panel.

19 ARBITRATOR GULIN: Good afternoon again,  
20 Mr. Purcell. The name of the service is OnAir.com  
21 that you offer?

22 THE WITNESS: The name of the Company was

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1 OnAir Streaming Networks. The URL or domain was  
2 OnAir.com, and we were commonly just called OnAir in  
3 the marketplace.

4 ARBITRATOR GULIN: Okay. And was that the  
5 same company that was formerly WWW.com?

6 THE WITNESS: Yes.

7 ARBITRATOR GULIN: Okay. When did that  
8 change occur?

9 THE WITNESS: We changed the name of that  
10 company in December time period of 1999, I believe,  
11 maybe a little bit earlier than that, in order to  
12 better clarify to the marketplace what we were doing,  
13 what we were all about.

14 ARBITRATOR GULIN: Okay. So when did you  
15 launch -- well, let's start with WWW.com.

16 THE WITNESS: Sure.

17 ARBITRATOR GULIN: When did you launch  
18 that?

19 THE WITNESS: The Company was incorporated  
20 in October of 1998, and we spent some time building  
21 the business models and the infrastructure and the  
22 technology that we would need through the summer of

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1 '99 when we acquired a small music streaming company  
2 in Los Angeles and used that as some of the base for  
3 what we eventually built. We actually began streaming  
4 in the late third, early fourth quarter of that year.

5 ARBITRATOR GULIN: And was that kind of a  
6 vanilla flavor of webcasting operation? There were no  
7 special functionalities like song skipping and --

8 THE WITNESS: No special functionalities,  
9 just basic station broadcasting. By station I mean  
10 our programmers were creating the genres of music that  
11 people could listen to.

12 ARBITRATOR GULIN: Okay. There was no  
13 rating function and no skip song function.

14 THE WITNESS: No. We did not -- in the  
15 initial phase, we did not incorporate a skip song. By  
16 the time we began thinking about what we really wanted  
17 to do, we found out what was and what was not  
18 permissible by the RIAA, and then decided we couldn't  
19 do it. The rating function, we preferred to just have  
20 more direct feedback with our DJs than have actual  
21 some sort of a rating deal.

22 ARBITRATOR GULIN: And was WWW.com a

1 syndicator?

2 THE WITNESS: Yes. Well, OnAir and WW,  
3 same Company.

4 ARBITRATOR GULIN: Same Company, right.  
5 Nothing changed in December of '99 when you became  
6 OnAir.com.

7 THE WITNESS: Only the name.

8 ARBITRATOR GULIN: Only the name.

9 THE WITNESS: Only the name. I bought the  
10 domain, OnAir.com, and changed the name of the  
11 Company.

12 ARBITRATOR GULIN: Okay. You ultimately  
13 entered into an agreement with RIAA. Was that around  
14 January of 2000?

15 THE WITNESS: Yes, December/January.

16 ARBITRATOR GULIN: Okay. And when did you  
17 begin streaming under that agreement?

18 THE WITNESS: Well, we had been streaming  
19 already, and we actually wound up writing them a check  
20 for some back -- what we had already streamed. So, in  
21 theory, we had been streaming under that agreement  
22 even prior to signing.

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1 ARBITRATOR GULIN: Do you remember what  
2 the term was for that agreement, what time period it  
3 covered?

4 THE WITNESS: I believe it was till  
5 December 31st of 2000. It was supposed to be in  
6 parallel with the arbitration proceedings.

7 ARBITRATOR GULIN: So it was retroactive  
8 back to '98?

9 THE WITNESS: When I signed it in -- yes,  
10 it was retroactive to whenever we had started  
11 streaming. We didn't stream in '98.

12 ARBITRATOR GULIN: Okay.

13 ARBITRATOR VAN LOON: Part of the  
14 framework under which we've received testimony has  
15 been in restricted session so that business elements,  
16 elements of agreement would not be known to the public  
17 at large and the transcripts from the portion of the  
18 period when it's in restricted session are not made  
19 public by the Library of Congress the way that all of  
20 the others are. And so we would like to go into  
21 restricted session at this point to ask specific  
22 questions about the terms of your agreement.

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1 (Whereupon, at 4:40 p.m., the proceedings  
2 went into Closed Session.)  
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1 CHAIRMAN VAN LOON: Before we start with  
2 this witness, I understand there's an additional  
3 administrative matter with Mr. Garrett.

4 MR. GARRETT: Mr. Chairman, we had  
5 mentioned last week that we wanted to have Mr. Marks  
6 testify concerning certain matters raised during the  
7 Mandelbrot testimony and in connection with that we  
8 had submitted a version of Mr. Mandelbrot's testimony  
9 back to Mr. Greenstein and asked that he go through it  
10 and make certain that all of the things that we  
11 deleted were agreeable to him and that there wasn't  
12 anything else that he wanted to have deleted.

13 He received the material on Thursday and  
14 as I understand it, he immediately it forwarded it  
15 over to the people at Yahoo!, Mr. Greenstein, and I  
16 spoke with him earlier this morning. He had not heard  
17 back yet from his client about our proposals and I  
18 have not heard back from Mr. Greenstein throughout the  
19 course of the day here. So as of this moment, we  
20 still do not have an agreement with Mr. Greenstein  
21 about exactly what form we can show the testimony to  
22 Mr. Marks. And because I also do not have a modus

1 that I can provide to the other side here as to the  
2 subjects in which Mr. Mark would testify, but I mean  
3 I understand they want their notice and I would like  
4 to get this thing wrapped up with Mr. Greenstein, but  
5 it's all dependent upon Yahoo! finally clearing it.

6 ARBITRATOR VON KANN: How much material,  
7 how large a volume of transcript pages or whatever did  
8 you give Mr. Greenstein and ask that you be able to  
9 show to Mr. Marks?

10 MR. GARRETT: I don't remember the exact  
11 number of pages. Half of that, of course, there  
12 should be no issue since -- the other, good Mr.  
13 Greenstein was present.

14 (Laughter.)

15 And so it was really just the deletions on  
16 the other part where we tried to at least allow the  
17 folks at RIAA to see how Mr. Mandelbrot had  
18 characterized RIAA's positions, RIAA's motivations,  
19 that sort of thing.

20 MR. STEINTHAL: Just in case the other Mr.  
21 Greenstein gets to read this, I'd like to object to  
22 the characterization of the good and the bad

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1 Greensteins.

2 MR. GARRETT: Mr. Greenstein knows how I  
3 referred to him in the last CARP proceeding.

4 (Laughter.)

5 ARBITRATOR VON KANN: Is there anything  
6 that we could do or could we ask that additional calls  
7 be made from all sides?

8 MR. GARRETT: I was hoping, I did not have  
9 a proposal and I hope not to have to involve you and  
10 I just want to report where we are here. I think the  
11 immediate issue is they want the other side here wants  
12 its notice of what it is we are going to testify to  
13 and --

14 MR. STEINTHAL: Perhaps you can assume  
15 that it's going to be okay, although I obviously have  
16 no idea, have had no communication with Mr. Greenstein  
17 about this at all, but at least you could notify me  
18 based on what you've given him and then it ain't going  
19 to be any larger universe, so that way I'll have the  
20 notice that I need.

21 MR. GARRETT: I can do that. We can  
22 probably get something to you later this evening.

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1 CHAIRMAN VAN LOON: That sounds like a  
2 good resolution.

3 ARBITRATOR VON KANN: That takes care of  
4 half the problem. The other half is if it's all quite  
5 on the Greenstein front and you are running up against  
6 deadlines with Marks, which I assume you probably are  
7 since he's due here Wednesday.

8 MR. GARRETT: That is the other problem.

9 MR. STEINTHAL: Can I just suggest in  
10 light of the witness's late hour that we deal with the  
11 administrative stuff after we're done with Mr.  
12 Heilbronn?

13 CHAIRMAN VAN LOON: I think that would  
14 fair it wasn't going to take more than 30 seconds.  
15 Our ruling is that we ask that you communicate to Mr.  
16 Greenstein that if we haven't heard by noon from  
17 tomorrow of specific problems, we're going to assume  
18 that this is agreed to and go forward on that basis.

19 MR. GARRETT: I will so communicate that  
20 to him now. Thank you very much.

21 MR. STEINTHAL: Thank you, Mr. Chairman.

22 CHAIRMAN VAN LOON: You're welcome. And

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1 thank you very much, Mr. Heilbronn for being with us  
2 and with sincere apologies that we've run later and  
3 later and we are still are all very mindful of the  
4 6:30 target and we think we're going to do everything  
5 humanly possible and think we'll be able to liberate  
6 you for your other meeting scheduled later this  
7 evening.

8 Let me ask you first, please, to raise  
9 your hand to be sworn in by our Court Reporter.

10 CHAIRMAN VAN LOON: Could you please state  
11 and spell your name for our record?

12 THE WITNESS: John Heilbronn, last name is  
13 spelled H-E-I-L-B-R-O-N-N.

14 CHAIRMAN VAN LOON: And if you would give  
15 the name of your company and the title, your title?

16 THE WITNESS: I am the President of  
17 Cablemusic Networks, Incorporated, a San Diego  
18 corporation.

19 CHAIRMAN VAN LOON: As you know, from the  
20 letter we sent, the Panel has some questions that we'd  
21 like to ask you. Counsel for either side will also  
22 have some questions. We are going to want to start

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1 off, we go in and out of public session, but there's  
2 a couple of matters that we want to ask you about that  
3 has been treated as restricted, not available to the  
4 public, so we'd like to ask you about those first and  
5 then we might go in public. Otherwise -- if at any  
6 point we're in public and there's something that you'd  
7 like to be received only in private session, please  
8 let us know.

9 THE WITNESS: Understood.

10 CHAIRMAN VAN LOON: Judge Gulin has some  
11 questions on behalf of the Panel. We're in restricted  
12 session.

13 (Whereupon, at 5:50 p.m., the proceedings  
14 went into Closed Session.)  
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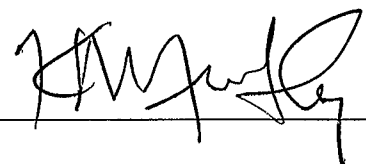
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Place:                Washington, DC

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